Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TECK COMINCO METALS, LTD.,

Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, AND STATE OF WASHINGTON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) makes liable "any person who . . . arrange[s] for disposal . . . of hazardous substances . . . by any other party or entity, at any facility . . . from which there is a release . . . of a hazardous substance." 42 U.S.C. § 9607(a)(3)-(4). Petitioner, a Canadian company, disposed of hazardous substances at its facility in Canada in accordance with that country's laws, and without the assistance of any "other person or entity." Some of those substances were carried to the United States by the flow of surface water. The questions presented are:

1. Whether the Ninth Circuit erred in concluding, in derogation of numerous treaties and established diplomatic practice, that CERCLA (and, by extension, other American environmental laws) can be applied unilaterally to penalize the actions of a foreign company in a foreign country undertaken in accordance with that country's laws; and

2. Whether the Ninth Circuit erred in concluding, in direct and acknowledged conflict with the First Circuit, that "arranger" liability under CERCLA does not require the involvement of any "other party or entity."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Teck Cominco Metals, Ltd. is a Canadian corporation; the parent corporation of Teck Cominco Metals, Ltd. is Teck Cominco Limited, also a Canadian corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Teck Cominco Metals, Ltd. respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 452 F.3d 1066. The opinion of the district court (App., *infra*, 29a-59a) is not officially reported but is electronically reported at 2004 WL 2578982.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2006. A timely petition for rehearing was denied on October 30, 2006. App., *infra*, 60a-61a. On January 12, Justice Kennedy extended the time within which to file a petition for writ of certiorari to and including February 27, 2007. No. 06A686. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a) provides in relevant part:

§ 9607. Liability

(a) Covered persons . . .

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable . . . .

Other pertinent provisions of CERCLA are reproduced in the appendix, *infra*, at 62a-67a.

STATEMENT

1. Petitioner is a Canadian corporation that owns and operates a smelting and refining complex in the city of Trail, which is in the province of British Columbia, in the sovereign nation of Canada. The Trail Smelter is located along the banks of the Upper Columbia River, approximately ten miles north of Canada's border with the United States. Today it is the largest lead-zinc smelter in the world. App., *infra*, 106a.

For nearly a century after it was built in 1895, waste generated by the Trail Smelter—known as "slag"—was discharged into the Upper Columbia River. Such disposal activities were, at all times, conducted in accordance with applicable laws of Canada and British Columbia—the governmental entities with authority to regulate operations at the Trail Smelter. During the twentieth century, such disposals were common among industrial plants sited along the Canadian and American banks of the Upper Columbia River. *See* App., *infra*, 71a ("Sources [of pollution in the Upper Columbia River] . . . include releases from mining and milling operations, fertilizer production, smelting operations, pulp and paper production, sewage treatment plants, and other industrial activities").

The Trail Smelter stopped discharging slag directly into the river in 1995. *See* Superfund Technical Assessment and Response Team, Region 10, U.S. EPA, TD: 01-02-0028, Upper Columbia River Expanded Site Inspection Report 2-13 (2003) ("2003 Report").

Residents of Washington State have periodically complained of pollution emanating from the Trail Smelter. In the 1920s, for example, air currents regularly carried sulfur dioxide emissions from the Trail Smelter south into the United States, triggering complaints by the citizens of Northport, Washington. Those complaints were resolved by diplomatic negotiations and, eventually, binding arbitration between governments. *See infra* at 10-11.

In 1999, the Confederated Tribes of the Colville Indian Reservation, which is located in Washington State, petitioned the U.S. Environmental Protection Agency ("EPA") to conduct an assessment of hazardous-substances contamination of the Upper Columbia River and surrounding lands in northeastern Washington. App., *infra*, 70a. The petition alleged that the Upper Columbia River had been polluted by Canadian and American smelters, pulp mills, and mining operations. *Id.* at 72a. In 2003, EPA issued findings that the U.S. portion of the Upper Columbia River had been contaminated by hazardous substances and that slag discharged from the Trail Smelter, carried downstream by surface water, was the primary source of that contamination. 2003 Report at 8-2.

In December of 2003, EPA issued a Unilateral Administrative Order ("UAO") pursuant to CERCLA § 106(a), 42 U.S.C. § 9606(a) (App. *infra*, 63a-65a), ordering petitioner—a Canadian company with no operations in the United States—to undertake a Remedial Investigation/Feasibility Study ("RI/FS") of the portion of the Upper Columbia River located in the United States. App., *infra*, 68a-69a. Section 106(a) of CERCLA permits the President to issue "such orders as may be necessary to protect public health and welfare and the environment" from an "actual or threatened release of a hazardous substance from a facility." 42 U.S.C. § 9606(a) (App., *infra*, 63a). EPA concluded that the "Upper Columbia River Site"—defined as "the areal extent of contamination *in the United States* associated with the Upper Columbia River, and all suitable areas in proximity to the

contamination necessary for implementation of response action"—was a CERCLA "facility." App., *infra*, 69a, 75a (emphasis added); *see* 42 U.S.C. § 9601(9) (defining a "facility" as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located") (App., *infra*, 62a). EPA further determined that the "potential migration of hazardous substances currently located at or emanating from the Site, . . . constitute actual and/or threatened 'releases.'" App., *infra*, 75a; *see* 42 U.S.C. § 9601(22) (defining "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment") (App., *infra*, 62a-63a).

The President's authority to issue investigation or remediation orders under CERCLA § 106(a) properly extends only to "responsible parties." *See Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004). EPA declared petitioner to be a "responsible party" subject to presidential authority under 42 U.S.C. §§ 9604, 9607, and 9622, which lay out the scope of the President's authority to order remedial actions. App., *infra*, 76a. This legal conclusion was predicated on EPA's factual finding that petitioner had "arranged for disposal of its hazardous substances" by discharging slag "into the Columbia River through several outfalls at the Trail Smelter," located *in Canada*. *Id.* at 72a.

Soon after the entry of the UAO, the Canadian government sent a diplomatic note to the U.S. State Department, expressing grave concern over EPA's "attempt[ ] to enforce . . . [CERCLA] on Teck Cominco Metals, a Canadian company operating in Canadian territory." App., *infra*, 100a. The Canadian government warned that "issuance of the Unilateral Administrative Order may . . . caus[e] transboundary environmental liability cases to be initiated in both Canada and the United States." *Ibid.* Canada urged the United States to withdraw the UAO and to negotiate outside of the coercive framework of CERCLA toward a "mutually acceptable and

enforceable agreement" based on Teck Cominco's longstanding offer "to undertake an environmental and health risk assessment." *Id.* at 100a-101a.

Petitioner thereafter notified EPA that it would not comply with an order premised on the American President's regulatory authority under CERCLA, but reiterated its willingness to enter into an "unequivocal[ ]" and "enforceable" agreement "to assume voluntarily the costs of investigation of the alleged contamination from the Trail Smelter, and the costs of appropriately addressing risks from that contamination." App., *infra*, 103a. EPA never moved to enforce the UAO and in June 2006, EPA and a U.S.-based affiliate of Teck Cominco reached a settlement—outside the CERCLA framework—under which the affiliate would conduct a study of the Site under EPA's supervision. *Id.* at 120a. Pursuant to that settlement, EPA withdrew the UAO. *Ibid.*

2. In July 2004, two residents of the Colville Reservation, Joseph A. Pakootas and Donald R. Michel, brought a citizen suit against petitioner, seeking to compel petitioner to comply with the UAO and to impose on petitioner statutory penalties for its alleged noncompliance. App., *infra*, 105a-112a; *see also* 42 U.S.C. § 9659(a) (providing for citizen suits to enforce "any . . . order which has become effective pursuant to this chapter") (App., *infra*, 67a); *id.* § 9606(b)(1) (providing for fines of up to $25,000 per day for failure to comply with "any order of the President under [Section 9606(a)]") (App., *infra*, 63a). The State of Washington later intervened as a plaintiff, filing a complaint in intervention substantially identical to that filed by Pakootas and Michel. App., *infra*, 113a-119a.

The two complaints closely tracked the UAO's factual findings and legal conclusions. They alleged that petitioner disposed of slag "directly into the Columbia River" in Canada, and that some portion of those hazardous substances migrated "downstream into waters of the United States." App.,

infra, 107a, 115a. The plaintiffs further alleged that a "significant volume" had accumulated on the U.S. side of the border, and that decay of the slag was releasing hazardous substances into the U.S. environment. *Ibid.*

Petitioner moved to dismiss the complaints on the ground, *inter alia*, that it was not a "responsible party" under CERCLA § 107(a). *Se* 42 U.S.C. § 9607(a) (App., *infra*, 65a). Petitioner argued, first, that in light of the strong presumption against the extraterritorial application of U.S. law (*e.g.*, *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*ARAMCO*)), CERCLA should not be construed to extend to a foreign party operating exclusively in a foreign country in compliance with that country's laws. Second, petitioner explained that it could not be liable as an "arranger" under CERCLA because there was no allegation that any "other party or entity" participated in the petitioner's disposal of waste in Canada.

a. The district court denied the motion to dismiss, concluding that petitioner was a potentially responsible "arranger" subject to presidential authority under CERCLA. App., *infra*, 29a-59a.

The district court acknowledged that, because petitioner's disposal activities took place only "at [petitioner's] 'facility' in Canada," App., *infra*, 51a, its ruling amounted to an "extraterritorial application of CERCLA." *Id.* at 55a. Although the district court could locate "no direct evidence that Congress intended extraterritorial application of CERCLA to conduct occurring outside the United States," *id.* at 57a, it nevertheless found that "extraterritorial application of CERCLA is appropriate in this case." *Id.* at 44a. The presumption against extraterritorial application of U.S. law does not apply, the court reasoned, whenever "failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." *Ibid.*

The district court also rejected petitioner's argument that one cannot be a covered "arranger" unless a third party disposes of the hazardous substances generated by the purported "arranger." The district court recognized that "[t]he 'plain language' of § 9607(a)(3) would appear to require another party, other than just the defendant, be involved in the disposal of the hazardous substances." *Id.* at 47a. Nevertheless, the district court held that "'arranger' liability under CERCLA cannot be ruled out for [petitioner]." *Id.* at 49a.

b. The Ninth Circuit affirmed.[1] Addressing the presumption against extraterritorial application of U.S. law, the Ninth Circuit interposed the "threshold question" of "whether this case involves a domestic or extraterritorial application of CERCLA." App., *infra*, 12a. Rejecting the view of the district court, the Ninth Circuit concluded that the UAO represented only a "domestic application of CERCLA," because "the operative event creating a liability under CERCLA is the release . . . of a hazardous substance," *id.* at 19a, and "the actual or threatened release here, the leaching of hazardous substances from slag that settled at the [Upper Columbia River] Site, took place in the United States." *Id.* at 21a. The court of appeals opined that the "location where a party arranged for disposal or disposed of hazardous substances is not controlling for purposes of assessing whether CERCLA is being applied extraterritorially." *Id.* at 20a. Accordingly, the Ninth Circuit did not address petitioner's argument—supported by the Governments of Canada and British Columbia as *amici curiae*—that the definitions of "covered persons" set out in Section 9607(a) should not be considered to apply to a foreign entity operating only in a foreign country in accordance with that country's laws.

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[1] As a threshold matter, the court of appeals concluded that EPA's June 2006 withdrawal of the UAO had not affected its jurisdiction. App., *infra*, 9a n.10. Whatever effect the withdrawal might have had on respondents' claims for injunctive and declaratory relief, "Pakootas's claims for civil penalties and for attorneys' fees are not moot." *Ibid.*

The Ninth Circuit also rejected petitioner's argument that "arranger" liability under Section 9607(a)(3) requires the involvement of a third party. App., *infra*, 23a-28a. The Ninth Circuit declared that the statute "does not make literal or grammatical sense as written," and that the phrase "by any other party or entity" was "ambiguous" and susceptible to multiple interpretations. *Id.* at 23a-24a, 26a. The court of appeals acknowledged that the phrase could be read as modifying the earlier phrase, "disposal or treatment," such that the statute would require "any other party or entity"—*i.e.*, someone other than the person who "owned or possessed" the hazardous substance—to be involved in the "disposal or treatment." *Id.* at 25a. But the court held that "by any other party or entity" also could be read as expanding the clause immediately preceding it, "owned or possessed by such person." This construction "require[d] reading the word 'or' into the provision," thus "modif[ying]" "[t]he text of § 9607(a)(3)" to encompass "'any person who . . . **arranged for disposal** or treatment . . . of hazardous substances **owned** or possessed **by such person [or] by any other party or entity** . . . .'" *Id.* at 24a (emphasis and alteration in original). In electing to rewrite the statute in this fashion, the Ninth Circuit departed company from the First Circuit, which had rejected precisely the textual modification embraced by the Ninth Circuit, and had concluded that "for arranger liability to attach, the disposal or treatment must be performed by another party or entity." *American Cyanamid Co.* v. *Capuano*, 381 F.3d 6, 24 (1st Cir. 2004); *see also* App., *infra*, 25a-26a (rejecting First Circuit's conclusion). CERCLA, the Ninth Circuit said, required "'a liberal judicial interpretation.'" *Id.* at 26a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has decided that American environmental laws can be applied to the activities of a foreign company in a foreign country in compliance with that country's laws. That holding is based on a clear misreading of CERCLA and departs widely from this Court's interpretation of statutes. It also departs from the bilateral diplomacy that has traditionally marked U.S.-Canadian relations and threatens to disrupt our ties with Canada, a key military and economic ally. Moreover, the Ninth Circuit has held that "*arranger*" liability can attach to the unilateral acts of a company in the absence of any *arrangement*. In so doing, the court of appeals created a direct and acknowledged split with the First Circuit.

I. THE NINTH CIRCUIT'S APPLICATION OF U.S. LAW TO CANADIAN CONDUCT DISREGARDS CORE PRINCIPLES OF INTERNATIONAL COMITY

The United States and Canada share a five-thousand-mile border, including approximately 150 rivers and lakes, which constitute over 90 percent of North America's and 20 percent of the world's fresh surface water. Noah Hall, *Bilateral Breakdown: U.S.-Canada Pollution Disputes*, 21-SUM Nat. Res. & Env't 18, 18 (2006). Both are highly industrialized nations and economic activity in one country will have an inevitable impact upon the environment of the other. Indeed, it has been said that "pollution respects no borders." Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail For CERCLA*, 14 N.Y.U. Envtl. L. J. 233, 235 (2006). That pollution can travel long distances means that pollution generated in one nation often will cause effects in another. *See, e.g.*, Environment Canada, *Acid Rain and the facts*, http://www.ec.gc.ca/acidrain/acidfact.html (last visited Feb. 25, 2007) (noting that sulfur dioxide emissions from the United States contribute to "acid rain" conditions in Eastern Canada).

A. The Decision Below Upsets A Century-Old Tradition Of Bilateral Solutions To Transboundary Pollution Problems

Since the Industrial Revolution, the United States and Canada have resolved their transboundary pollution problems bilaterally, including government-to-government diplomatic negotiations and, occasionally, arbitrations between the sovereigns. In the 1909 Boundary Waters Treaty, Great Britain (on behalf of Canada) and the United States established an International Joint Commission ("IJC") and granted it jurisdiction over not only "cases involving the use or obstruction or diversion" of the navigable waters shared by the two nations, but also "any other questions or matters of difference arising between them involving the rights . . . of either in relation to the other or to the inhabitants of the other, along the common frontier." *See* Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, ("1909 Boundary Waters Treaty"), 36 Stat. 2451-52.

In the late 1920s, when sulfur dioxide emissions from the Trail Smelter—the very same smelter at issue in this case—were carried by air currents to Northport, Washington, the United States presented an official complaint to the Government of Canada. *See* D. H. Dinwoodie, *The Politics of International Pollution Control: The Trail Smelter Case*, 27 Int'l J. 219, 221-22 (1971-72). Later that year, the United States suggested that the dispute be submitted to the IJC created by the 1909 Boundary Waters Treaty. *See* John E. Read, *The Trail Smelter Dispute*, 1 Can. Y.B. Int'l L. 213, 214 (1963). In 1932, the IJC recommended an award for damages, but the United States rejected the award as insufficient. Dinwoodie, *supra*, at 227. After two more years of unfruitful bilateral negotiations, the countries agreed to submit the dispute to binding arbitration before a three-member tribunal. Read, *supra*, at 214. The tribunal ultimately affirmed the IJC's award of damages. *Id.* at 214.

The Trail Smelter Case established the now-rudimentary principle of international environmental law that every nation "is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control . . . are conducted so as not to cause significant injury to the environment of another state . . . ." Restatement (Third) of the Foreign Relations Law of the United States § 601(1) (1987); *see also* 1909 Boundary Waters Treaty, 36 Stat. 2450 ("waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other"). When the inhabitants of one nation do cause injury to the environment of another, the injured nation may seek reparations "either through diplomatic channels *or through any procedure to which the two states have agreed.*" Restatement (Third) of the Foreign Relations Law of the United States § 902(1) (emphasis added).

In keeping with these foundational principles of international law, the United States and Canada have continued to search out cooperative solutions to environmental issues of shared concern. In 1978, confronting the pollution of the Great Lakes shared by the two nations, the United States and Canada developed a comprehensive agreement to clean up and protect those natural resources. *See* Great Lakes Water Quality Agreement, U.S.-Can., Nov. 22, 1978, 30 U.S.T. 1383. Later, the United States and Canada entered into an agreement that specifically provided that disputes between the United States and Canada on air quality issues should be handled diplomatically in the first instance, and if intractable, should be submitted by the sovereigns to binding arbitration. *See* Agreement Between the Government of the United States of America and the Government of Canada on Air Quality, U.S.-Can., Mar. 13, 1991, 30 I.L.M. 676. And after the ratification of the North American Free Trade Agreement, the United States, Canada, and Mexico entered into a series of side agreements that provide for environmental cooperation

and, significantly, stipulate procedures by which the countries can address another nation's failure to enforce its own environmental laws. *See* North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (pts. 1-3); 32 I.L.M. 605 (pts. 4-8) (entered into force Jan. 1, 1994).

It was against this backdrop of cooperative solutions to transboundary environmental problems—a backdrop of which Congress certainly was aware, *see* United States-Canadian Negotiations on Air Quality, Pub. L. No. 95-426, 92 Stat. 990 (1978) (recognizing that "the United States and Canada have a tradition of cooperative resolution of issues of mutual concern which is nowhere more evident than in the environmental area")—that Congress enacted CERCLA. *Cf. Chew Heong* v. *United States*, 112 U.S. 536, 550 (1884) ("When the act of 1882 was passed, congress was aware of the obligation this government had recently assumed, by solemn treaty"); *see generally Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988) ("Congress understands the state of existing law when it legislates").

B. The Decision Below Improperly Disregards The Presumption Against Extraterritorial Application Of U.S. Law

This Court has consistently adhered to the "longstanding principle of American law" that "'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *ARAMCO*, 499 U.S. at 248 (quoting *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949)). This presumption against extraterritoriality flows naturally from the "commonsense notion that Congress generally legislates with domestic concerns in mind," *Smith* v. *United States*, 507 U.S. 197, 204 n.5 (1993), and, as this Court explained in *ARAMCO*, "serves to protect against unintended clashes between our laws and those of other nations." 499 U.S. at 248; *see also American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909) (Holmes, J.) (explaining that "if [another jurisdiction] should happen to

lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent").

This case represents a very real "clash" between the laws of separate sovereigns. Canada (at the national level) and British Columbia (at the provincial level) regulate petitioner's Canadian operations, including discharges from the Trail Smelter. Those governments have made clear through both diplomatic and judicial channels that they do not agree with EPA's attempt to exercise unilateral authority over petitioner pursuant to CERCLA. *See, e.g.*, Gov't of Canada C.A. Br. 3 ("The Government of Canada has a strong interest in preserving from interference, by private litigation in U.S. courts, its sovereign right to regulate Canadian persons and companies operating in Canada"); *see also* App., *infra*, 101a. Only if the statute unequivocally *required* the exercise of such authority would the Judiciary be warranted in disregarding the views of our neighbors to the North. Of course it does not.

To overcome the presumption against extraterritoriality, the intention of Congress to apply the statute beyond the borders of the United States must be "clearly expressed." *ARAMCO*, 499 U.S. at 248 (internal quotation omitted). The "possibility" that Congress anticipated an extraterritorial application "is not a substitute for the affirmative evidence of intended extraterritorial application that our cases require." *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 176 (1993); *see also Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) (holding that Labor Management Relations Act did not apply to a labor dispute involving a foreign-flagged ship because Congress had not "clearly expressed" its "affirmative intention" to reach such conduct). A *clear* expression of congressional intent is needed because a decision to apply U.S. law extraterritorially inevitably reverber-

ates through the "delicate field of international relations." *Benz*, 353 U.S. at 147. "The Judiciary has neither aptitude, facilities nor responsibility" for decisions of this nature. *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

A corollary to this requirement of "affirmative evidence" of congressional intent, *see Sale*, 509 U.S. at 176, is that courts must strictly construe statutes in light of the presumption against extraterritoriality. Thus, in *Small v. United States*, 544 U.S. 385 (2005), the Court held that a general term such as "any court" presumptively "refers only to domestic courts, not to foreign courts." *Id.* at 394. And in *F. Hoffmann-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004), this Court instructed that as long as a "statute's language reasonably permits an interpretation " that avoids extraterritorial application, a court "should adopt it." *Id.* at 174. Indeed, even where "the more natural reading of the statutory language" would permit extraterritorial application of the statute, courts should reject that construction unless the language itself demonstrates that the court "*must* accept that reading." *Ibid.*

1. The Ninth Circuit held that the imposition of liability on a Canadian corporation for disposal activities undertaken exclusively in Canada "involves a domestic application of CERCLA," and thus that the presumption against extraterritoriality did not apply. App., *infra*, 3a. That conclusion is incorrect for at least three reasons.

First, the notion that the court of appeals was applying CERCLA only domestically is bottomed on its deeply flawed premise that "the operative event creating a liability under [Section 9607(a)(3) of] CERCLA is the release or threatened release of a hazardous substance." App., *infra*, 19a. Based on that premise, the Ninth Circuit concluded that "[t]he location where a party arranged for disposal or disposed of hazardous substances is not controlling for purposes of assessing

whether CERCLA is being applied extraterritorially." *Id.* at 20a. But contrary to the Ninth Circuit's reasoning, CERCLA does not create, upon the release of a hazardous substance, "a liability" in the abstract. Section 9607 of CERCLA—entitled "Liability"—imposes liability for cleanup costs on "any person" who engages in particular categories of *conduct*. *See* 42 U.S.C. § 9607(a) (App., *infra*, 65a). To be sure, just as there can be no crime of murder without a death, there can be no liability under CERCLA without a release. *See id.* § 9607(a)(4). But that a release is *necessary* for CERCLA liability, or a death necessary for murder liability, hardly makes either *sufficient* to establish that liability. Liability under CERCLA is triggered only by the *conduct* described in Section 9607(a)—which, in this case, occurred entirely in Canada.

Second, and relatedly, this Court often enough has recognized that the canon against extraterritorial application of U.S. law applies whenever the statute purports to proscribe conduct outside of the United States. *See Smith*, 507 U.S. at 203-04 (applying canon to hold that Federal Tort Claims Act does not apply to claims arising in Antarctica); *ARAMCO*, 499 U.S. at 249-51 (applying canon to hold that Title VII of the Civil Rights Act of 1964 does not regulate the employment practices of American firms employing American citizens abroad). If, as in *Smith* and *ARAMCO*, the extraterritoriality canon can prevent a U.S. statute from reaching the overseas conduct of a *U.S. person*, it applies *a fortiori* to restrict statutes from reaching the overseas conduct of *foreign persons*. *See, e.g.*, *Empagran*, 542 U.S. at 174 (applying canon against extraterritoriality to Sherman Act claim against foreign defendant for price-fixing activities outside of the United States).

Third, even if the Ninth Circuit were correct that the application of CERCLA in this case was, in some sense, domestic, it would not follow that the court of appeals was at liberty to disregard the canon against extraterritoriality. In

Small, this Court recognized that "the presumption against extraterritorial application does not apply directly to th[e] case" (which reviewed a criminal conviction for being a felon in possession of a firearm in the United States), but nevertheless found that an "ordinary assumption" "about the reach of domestically oriented statutes" necessarily guided its construction of the general term "any court." 544 U.S. at 389-90. In the absence of any indication that Congress intended the general term to include foreign courts, this Court held that the term must be construed to "refer[ ] only to domestic courts, not to foreign courts." *Id.* at 394.[2]

2. Respondents also argued below—as the district court had held, App., *infra*, 38a—that the presumption against extraterritorial application of U.S. law did not apply "where the failure to extend the scope of the statute to a foreign setting will result in adverse effects in the United States." Pakootas C.A. Br. 20 (quoting *Environmental Def. Fund, Inc.* v. *Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993)). Respondents argued that this exception, which supposedly is triggered

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[2] Addressing *Small*, the court of appeals appeared to hold that Congress intended to include foreign corporations within CERCLA's general term "any person." App., *infra*, 17a; *see also* 42 U.S.C. § 9601(21) (defining "person"). But the question before the court of appeals was whether Congress intended the term "any person who arranges for disposal or treatment" to include persons who dispose of waste outside of the United States. Tellingly, the Ninth Circuit avoided any straightforward or detailed analysis of this Court's decision in *Small*, preferring instead to determine whether application of CERCLA to foreign corporations would pass muster under *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610 (1818), on which "[t]he decision in *Small* was based in part." App., *infra*, 16a. *Small*, however, cited *Palmer* only in a six-case string cite. And *Palmer* itself dealt with the reach of a statute addressing piracy on the high seas. 16 U.S. at 630. The Court concluded that a crime of robbery on the high seas *on a vessel belonging to a foreign state* against foreign persons was not within the ambit of the relevant statute. *Id.* at 633-34. *Palmer* is thus another example of a case in which the Court did not read Congress as intending a statute to reach acts undertaken in a foreign jurisdiction.

whenever a plaintiff alleges that foreign conduct has adverse effects in the United States, is rooted primarily in this Court's decision in *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 287-88 (1952). Pakootas C.A. Br. 21-23; *see also* App., *infra*, 19a. But *Steele* does not remotely establish the encompassing exception which the district court envisioned.

In *Steele*, the Court confronted a trademark infringement action brought against a U.S. citizen and resident who manufactured and sold counterfeit watches in Mexico. 344 U.S. at 284-85. Stressing that the United States can "govern[ ] the conduct of *its own citizens* . . . in foreign countries," the *Steele* Court noted that Steele's "purchases in the United States . . . were essential steps in the course of business consummated abroad." *Id.* at 285-86, 287 (emphasis added). The Court further noted that "by his own deliberate acts, *here and elsewhere*, [Steele has] brought about forbidden results within the United States." *Id.* at 288 (internal quotation marks omitted and emphasis added). Holding him liable for such acts, the Court concluded, would not "impugn foreign law" or "interfere[ ] with the sovereignty of another nation." *Id.* at 285. In contrast, petitioner is *not* a U.S. citizen, did *not* commit any acts in the U.S., and holding it liable *would* disrupt foreign relations. In these circumstances, *Steele* does not apply. *See Vanity Fair Mills, Inc.* v. *T. Eaton Co.*, 234 F.2d 633, 642 (2d Cir. 1956); *McBee* v. *Delica Co.*, 417 F.3d 107, 118 (1st Cir. 2005).

Moreover, even when Congress has made clear that a statute applies to foreign conduct—as it has with the Sherman Act, *see Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993)—the presumption remains relevant to determining the *extent* of a statute's extraterritorial reach. *See Empagran*, 542 U.S. at 173-74 (applying presumption to limit Sherman Act's application to foreign conduct). Particularly where the extraterritorial application advanced by a party will cause "unreasonable interference with the sovereign authority of other nations," *id.* at 164, in the absence of

"affirmative evidence" that Congress intended the statute to reach the foreign conduct at issue, *Sale*, 509 U.S. at 176, a court "*must* accept" any "reasonably permi[ssible]" reading of the statutory language that will avoid that discordant result. *Empagran*, 542 U.S. at 174 (emphasis in original).

C. The Decision Below Misconstrues CERCLA's Text and Structure

Here, CERCLA's "statutory language" not only "reasonably permits an interpretation" that avoids its extraterritorial application, but the relevant statutory language indisputably compels that interpretation.

Petitioner cannot be held liable under CERCLA unless it is a "covered person" under Section 9607(a). *See Cooper Indus.*, 543 U.S. at 161. The court of appeals held that petitioner is a "covered person" because Section 9607(a)(3) "applies to 'any person' who arranged for the disposal of hazardous substances." App., *infra*, 16a. This reading badly misapprehends the statutory text.

In relevant part, Section 9607(a)(3) is a sentence fragment that provides that "any person who by contract, agreement, or otherwise arranged for disposal . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility." 42 U.S.C. § 9607(a)(3). Subsections (a)(1) and (a)(2) likewise are sentence fragments. *See, e.g.*, 42 U.S.C. § 9607(a)(1) ("the owner and operator of a vessel or a facility"). The courts of appeals uniformly have recognized that the last clause of Section 9607(a)(4)—"from which there is a release . . . of a hazardous substance, shall be liable for"—modifies *all four* subparts of Section 9607(a). *See, e.g.*, *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1043 n.16 (2d Cir. 1985).[3] Thus, the arranger liability provision actually reads as follows:

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[3] As the Second Circuit explained: "The phrase 'from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance' is incorporated in and seems to flow as if

> any person who by contract, agreement, or otherwise arranged for disposal . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . .from which there is a release . . . of a hazardous substance, shall be liable for—.

42 U.S.C. § 9607(a)(3)-(4).

To be a covered "arranger," therefore, one must "arrange[ ] for *disposal* . . . of hazardous substances . . . *at any facility . . . from which there is a release*." *Id.* (emphases added). This language makes absolutely clear that the "disposal" must take place at the same "facility" "from which there is a release." The statutory text does not permit liability to attach when a person arranges for disposal at one "facility," and the pertinent "release" emanates from some other "facility." Yet that is precisely the allegation in this case: The "disposal" occurred at a "facility" in Canada, while the "release" emanated from a different "facility" entirely within the United States. *See* App., *infra*, 14a ("The Order defines the facility as being entirely within the United States").

With plaintiffs and the Ninth Circuit having defined the relevant "facility . . . from which there is a release" as being "entirely within the United States," App., *infra*, 37a, CERCLA "arranger" liability could attach only if petitioner "arranged for disposal" of its hazardous substances at *that same U.S. facility*. But the Ninth Circuit's opinion is ex-

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[Footnote continued from previous page]
it were a part only of subparagraph (4), but it is quite apparent that it also modifies subparagraphs (1)-(3) inclusive." *Shore Realty Corp.*, 759 F.2d at 1043 n.16. The Second Circuit reviewed the relevant statutory history and noted that originally "the commencing clause 'from which there is a release' was printed as a new line." *Ibid.*; *see also Control Data Corp.* v. *S.C.S.C. Corp.*, 53 F.3d 930, 934 n.7 (8th Cir. 1995) (same); *United States* v. *Alcan Aluminum Corp.*, 964 F.2d 252, 257 n.4 (3d Cir. 1992) (same); *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1151 n.4 (1st Cir. 1989) (same).

pressly premised on the allegation that "Teck . . . arrang[ed] in *Canada* for disposal of the slag." *Id.* at 16a (emphasis added). And rightly so: The UAO is absolutely clear that petitioner's disposal activities took place in Canada "through several outfalls at the Trail Smelter," *id.* at 72a, and the operative complaints similarly acknowledge that, only after petitioner disposed of its waste slag in Canada, was it "carried downstream into the waters of the United States." *Id.* at 107a, 115a. Where the CERCLA "facility" is located in the United States, a correct reading of CERCLA's "arranger" liability provision does not permit disposal activities outside of the United States to trigger liability.[4]

It was only by reading Section 9607(a)(3) in isolation from the last clause of subsection (a)(4)—contrary to the otherwise unanimous view of the Circuits—that the Ninth Circuit could find that petitioner's disposal of slag in Canada could make petitioner liable for a subsequent release from a facility in the United States. By construing CERCLA's arranger liability provision to reach persons who dispose of

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[4] Any suggestion that, because it knew some portion of its slag would be carried into the United States, Teck Cominco should be deemed to have disposed of its waste in the United States would have been legally defective. Such a suggestion would require a court to construe the term "disposal" to include passive migration of waste subsequent to its initial introduction into the environment. The en banc Ninth Circuit rejected a similar passive migration claim in *Carson Harbor Vill., Ltd.* v. *Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001). *See also* App., *infra*, 19a n.17 ("'passive' terms . . . are not included in the definition of 'disposal'") (quoting *Carson Harbor Vill.*, 270 F.3d at 878 (internal quotation marks omitted)); *see also United States* v. *150 Acres of Land*, 204 F.3d 698, 706 (6th Cir. 2000) (concluding that absent "any evidence that there was human activity involved in whatever movement of hazardous substances occurred on the property," there is no "disposal"); *ABB Indus. Sys., Inc.* v. *Prime Tech., Inc.*, 120 F.3d 351, 357-58 (2d Cir. 1997) ("gradual spreading of hazardous chemicals already in the ground" is not "disposal"); *United States* v. *CDMG Realty Co.*, 96 F.3d 706, 722 (3d Cir. 1996) ("[T]he passive spreading of contamination in a landfill does not constitute 'disposal' under CERCLA").

waste outside the United States, the Ninth Circuit disregarded this Court's clear instruction that, in the absence of evidence of congressional intent to the contrary, general terms should be construed to refer only to domestic persons or conduct. *See Small*, 544 U.S. at 394. And by rejecting a construction of the statute limited to domestic conduct that was not only "reasonably permi[ssible]," but indeed *compelled* by the plain text of the statute, the Ninth Circuit disregarded this Court's teaching that courts "should adopt" such constructions. *Empagran*, 542 U.S. at 174. The Ninth Circuit's refusal to faithfully apply these controlling authorities warrants this Court's review. *See* Sup. Ct. R. 10(c).

D. The Decision Below Threatens To Disrupt The Foreign Policy Of The United States

If there were *any* doubt that CERCLA should not be construed to apply to the foreign operations of a foreign company conducted pursuant to foreign law, it would be dispelled by the longstanding rule that American statutes should not be read as transgressing the law of nations. *See, e.g.*, *Hartford Fire Ins.*, 509 U.S. at 815 ("statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law"); *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

The Ninth Circuit's conclusion that EPA can *unilaterally* impose CERCLA liability on a Canadian company doing business in Canada in compliance with Canadian law, over the strong objections of the Canadian national and provincial governments, would wreck the elegant bilateralism that has distinguished U.S.-Canadian environmental relations for the past century. The Ninth Circuit's decision, if allowed to stand, would usurp the foreign-relations powers of the political branches and could provoke retaliatory actions against American interests by Canada or her courts. And it would do

so entirely unnecessarily, because the ordinary presumption against the extraterritorial effect of American law is sufficient cause to construe the statute in a way that both effectuates the intent of Congress and avoids a crisis of international comity.

Private litigation over this and similar transboundary pollution disputes would place at risk the President's ability to conduct foreign policy, because the Executive's reasoned policy decisions regarding America's dealings with other nations would be supplanted by the choices of self-interested litigants. Particularly where environmental issues are concerned, the formulation of foreign policy requires the balancing of many possibly conflicting considerations. *See, e.g.*, Press Release, President Bush Discusses Global Climate Change (June 11, 2001) (last visited Feb. 25, 2007), http://www.whitehouse.gov/news/releases/2001/06/print/20010611-2.html (observing that adherence to the Kyoto Protocol on global climate change would have a negative economic impact within the United States). And indeed, in some circumstances, the President's foreign policy goals may dictate the temporary subordination of environmental concerns so that other more pressing matters may be addressed. For example, the President might find it difficult to press the Canadian government to continue its military presence in Afghanistan if Canadians were preoccupied with the prospect of being sued by EPA and private U.S. parties in American courts for conduct that occurred in Canada and in compliance with Canadian law.

While the President (and Congress) are well suited to the balancing of several policy considerations, it is universally acknowledged that "the Judiciary has neither aptitude, facilities nor responsibility," *Chicago & S. Air Lines*, 333 U.S. at 111, to navigate "the[se] possibilities of international discord." *Benz*, 353 U.S. at 147. Yet "international discord" is precisely what the Ninth Circuit's decision has sown, and will continue to sow. *See* Gov't of Canada C.A. Br. 3. With

a single decision, a three-judge panel of one intermediate appellate court has deeply undermined the elaborate bilateral framework agreed to by sovereign governments over long decades of negotiations.

Moreover, it is not just American relations with the government of Canada that could be affected by extraterritorial application of CERCLA. The United States shares a long southern border with Mexico. Many of America's coastal States (Alaska, for instance) are close to territory controlled by other sovereigns. And mercury emitted by smokestacks in Asia can ride the prevailing winds across the Pacific Ocean before being deposited in the lakes and streams of California. *See, e.g.*, Douglas J. Steding & A. Russell Flegal, *Mercury Concentrations in Coastal California Precipitation: Evidence of Local and Trans-Pacific Fluxes of Mercury to North America*, 107 J. Geophysical Res. ACH 11-1, 11-6 (2002). Even if only a relatively small amount of the hazardous substances were attributed to the Asian source, that could be enough both to convert that foreign entity into a "potentially responsible party" subject to Section 113 contribution actions and to permit imposition of liability for cleanup costs. *See* 42 U.S.C. § 9613(f)(1) (App., *infra*, 66a). The Ninth Circuit's decision thus threatens to interfere the Executive's ability to conduct foreign policy not only within North America, but anywhere air and ocean currents may carry pollutants—potentially, anywhere in the world.

Committing transboundary pollution disputes to private litigation would, in the long run, have a deleterious effect on U.S. interests. The Ninth Circuit's extraterritorial application of CERCLA could cause other nations to enact or interpret reciprocal laws to make U.S. polluters liable for the foreign effects of their U.S. activities. *See, e.g.*, *Barclays Bank PLC* v. *Franchise Tax Bd. of California*, 512 U.S. 298, 324 n.22 (1994) (noting the "retaliatory legislation" enacted by Great Britain in response to California's enactment of worldwide income reporting requirement). And, given the Ninth Cir-

cuit's large size and the great length of its borders with Canada and Mexico, that would remain the case even if no other American court adopted the Ninth Circuit's construction of the statute. Indeed, the Canadian government has already foreshadowed such a result, warning in its diplomatic note that the UAO "may set an unfortunate precedent, by causing transboundary environmental liability cases to be initiated in *both Canada and the United States*." App., *infra*, 100a (emphasis added).

U.S. interests would suffer gravely under the Ninth Circuit regime. The United States is a net exporter of certain types of pollution. *See, e.g.*, Environment Canada, *supra*, (observing that, in the year 2000, the United States emitted six times as much sulfur dioxide as Canada). It accordingly stands to reason that U.S. polluters may cause more environmental problems in foreign nations than foreign polluters cause in the United States. If Canada and other nations were to enact or enforce legislation similar to the court of appeals' interpretation of CERCLA, U.S. interests could send abroad more money to clean up foreign lands than they would recover from foreign entities for the cleanup of American lands.

The decision below thus portends both to constrain the President's ability to conduct foreign policy and to consign U.S. firms to underwrite massive environmental cleanup efforts in Canada and beyond. The fact that the Ninth Circuit proffered no basis whatever for believing that Congress intended such hugely significant and untoward results marks this case as one of exceptional importance warranting this Court's review.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE FIRST CIRCUIT'S CONCLUSION THAT "ARRANGER" LIABILITY REQUIRES THE INVOLVEMENT OF A THIRD PERSON

Even if this case did not raise an exceedingly grave question of international relations, which it does, it would warrant review because the decision below creates a direct conflict of federal appellate authority on one of CERCLA's core liability provisions.

1. In *American Cyanamid Co.* v. *Capuano*, 381 F.3d 6 (1st Cir. 2004), the First Circuit considered whether brokers of waste—individuals who facilitated the disposal of waste generated by another party—could be liable as "arrangers." The defendants argued that, under the plain language of Section 9607(a)(3), they could not be liable as an arranger unless they "owned or possessed" the hazardous substances that were subsequently released in the environment. 381 F.3d at 23; *see also* 42 U.S.C. § 9607(a)(3) ("any person . . . who arrange[s] for disposal . . . of hazardous substances owned or possessed by such person"). The plaintiff, on the other hand, argued that the defendants could be held liable as an "arranger" whether or not they "owned or possessed" the hazardous substances. 381 F.3d at 23-24. The plaintiff contended that the clause "by any other party or entity" expands disjunctively the preceding clause—"owned or possessed by such person"—such that "any person" could be liable for arranging for the disposal of hazardous substances "owned or possessed by such person [or] *by any other party or entity*." *Id.* at 23; *see also Am. Cyanamid Co.* v. *Capuano*, No. 03-2143, Br. of Appellee at 67-68.

The First Circuit flatly rejected the plaintiff's argument. "The sentence structure of § 9607(a)(3)," the First Circuit concluded, "makes it clear" that "'by any other party or entity'" "modif[ies] the words 'disposal or treatment,'" and "clarifies that, for arranger liability to attach, the disposal or

treatment must be performed *by another party or entity*." 381 F.3d at 24 (emphasis added). The "plain language of the statute" mandates that an "arranger" have owned or possessed the hazardous substances in issue. *Id.* at 23-24.[5]

The First Circuit's construction, moreover, was in accord with the substantially uniform view of the Circuits. *GenCorp, Inc.* v. *Olin Corp.*, 390 F.3d 433, 448 (6th Cir. 2004) ("the statute requires ownership or possession of the waste"); *Morton Int'l, Inc.* v. *A.E. Staley Mfg. Co.*, 343 F.3d 669, 677 (3d Cir. 2003) ("First, proof of ownership, or at least possession, of the hazardous substance is required by the plain language of the statute"); *Raytheon Constructors Inc.* v. *Asarco Inc.*, 368 F.3d 1214, 1219 (10th Cir. 2003) ("To be held liable under CERCLA as an arranger, a party must . . . 'own' or 'possess' the hazardous substance at issue"); *United States* v. *Vertac Chem. Corp.*, 46 F.3d 803, 810 (8th Cir. 1995) ("Liability under § 9607(a)(3) requires, among other things, that the hazardous substances be 'owned or possessed by' the person who arranged for the disposal"). *But see Cadillac Fairview/Cal., Inc.* v. *United States*, 41 F.3d 562, 565 (9th Cir. 1994) ("Liability is not limited to those who own the hazardous substances, who actually dispose of or treat such substances, or who control the disposal or treatment process").

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[5] Notwithstanding the plaintiffs' erroneous construction of the statute, the First Circuit affirmed the district court's imposition of "arranger" liability, holding that the facts found by the district court sufficed to establish defendants' "constructive possession of the waste." *Id.* at 25. The court's conclusion that "the disposal or treatment must be performed by a third party," cannot, however, be dismissed as mere *dicta*. *Id.* at 24. That conclusion followed ineluctably from the First Circuit's interpretation of "by any other party or entity" as modifying "disposal or treatment"—a construction that is binding on the courts subject to the First Circuit's appellate supervision. *See, e.g.*, *Eulitt* v. *Maine*, 386 F.3d 344, 349 (1st Cir. 2004).

2. The Ninth Circuit looked at the same text as the First Circuit and adopted precisely the construction that the First Circuit rejected. App., *infra*, 25a-26a. Echoing the reasoning of the First Circuit, petitioner argued that the clause "'by any other party or entity'" modifies "'disposal or treatment'" and "clarifies that, for arranger liability to attach, the disposal or treatment must be performed by another party or entity." *American Cyanamid*, 381 F.3d at 24; *see* Pet. C.A. Br. 38-9. The Ninth Circuit rejected that construction, holding that, rather than modify "disposal or treatment," "by any other party or entity" should be read as a disjunctive clause expanding upon "owned or possessed by such person." App., *infra*, 24a.[6]

In the Ninth Circuit's view, "[t]he text of § 9607(a)(3)" should be "modified" to read, "any person who . . . arranged for disposal or treatment . . . of hazardous substances **owned** or possessed **by such person [or] by any other party or entity** . . . ." App., *infra*, 24a (emphasis in original). The Ninth Circuit thus expressly—and unilaterally—inserted into the statute a word that the political branches did not see fit to include, in derogation of the settled principle that "[courts]

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[6] The Ninth Circuit justified its textual modification, in part, on the basis that the First Circuit's construction "would leave a gaping and illogical hole in the statute's coverage." App., *infra*, 26a. Specifically, the court of appeals fretted that a generator of waste who "disposed of the waste on the property of another"—the so-called "midnight dumper"—could escape liability. *Ibid.* It is well-established, though, that a person who disposes of waste on another's property may be held liable as an "operator" of that "facility" under 42 U.S.C. § 9607(a)(2) (App., *infra*, 65a). *See, e.g.*, *American Cyanamid*, 381 F.3d at 23; *see also United States* v. *Bestfoods*, 524 U.S. 51, 66 (1998) (defining operators as those who "manage, direct, or conduct operations specifically related to pollution"). And, contrary to the suggestion in the decision below, in the Ninth Circuit at least, a generator who transports his own waste may be held liable as one who "accepted any hazardous substances for transport" under 42 U.S.C. § 9607(a)(4). *See Pritikin* v. *Department of Energy*, 254 F.3d 791, 795 (9th Cir. 2001).

have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision." *United States* v. *Temple*, 105 U.S. 97, 99 (1882).

The Ninth Circuit thus adopted exactly the textual "modifi[cation]" that the First Circuit rejected as "clear[ly] . . . [in]correct." *Am. Cyanamid*, 381 F.3d at 24. The appellate adoption of mutually exclusive interpretations of a provision of CERCLA is, of course, a sufficient basis for a grant of certiorari. *See, e.g.*, *United States v. Atlantic Research Corp.*, 127 S. Ct. 1144 (2007) (order granting certiorari). Here, furthermore, the need for this Court's review is amplified by the fact that the First and Ninth Circuits' mutually exclusive interpretations of "by any other party or entity" implicate two separate aspects of CERCLA "arranger" liability.

First, in adopting its countertextual construction, the Ninth Circuit—concededly—set itself at loggerheads with the First Circuit's conclusion that the "by any other party or entity" clause confirmed that a third party—someone other than he who "otherwise arrange[s] for disposal"—must dispose of the hazardous substances at issue. *Compare* App., *infra*, 28a ("the arranger element can be met when disposal is not arranged 'by any other party or entity'") *with Am. Cyanamid*, 381 F.3d at 24 ("the disposal or treatment must be performed by another party or entity"); *cf. United States* v. *Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996) ("'[o]therwise arranged' is a general term following in a series of two specific terms and embraces the concepts similar to those of 'contract' and 'agreement'").

Second, in holding that "'by any other party or entity' refers to ownership of the waste, such that one may be liable under § 9607(a)(3) if they arrange for disposal of their own waste or someone else's," App., *infra*, 28a, the Ninth Circuit deepened a pre-existing circuit conflict on the question whether an "arranger" must have owned or possessed the

waste at issue. As noted *supra* at 26, in the First, Third, Eighth, and Tenth Circuits (at least), arranger liability extends only to persons who "owned or possessed" the hazardous substances." *E.g.*, *Morton Int'l*, 343 F.3d at 677 ("First, proof of ownership, or at least possession, of the hazardous substance is required by the plain language of the statute"). In the Ninth Circuit, however, arranger liability may reach to *any* person who "otherwise arrange[s] for disposal or treatment . . . hazardous substances," regardless of their ownership or possession of the waste.[7]

Thus, as things now stand, one can be held liable in the Ninth Circuit as a responsible "arranger" absent both the involvement of a third party and any ownership or possession the hazardous substances in issue; but that same person, if sued in the First Circuit, could not be held so responsible. A single company with nationwide operations, therefore, could be subject to CERCLA penalties if sued in Washington but not in Maine—even for the identical conduct. Such a state of affairs is antithetical to the uniform remedial scheme that Congress envisioned in enacting CERCLA. This direct and acknowledged conflict warrants review and resolution by this Court.

CONCLUSION

In light of the patent incorrectness of the decision below, the conflict it creates with prior decisions, and its potential to disrupt international relations, the petition for a writ of certiorari should be granted. At minimum, the Court should invite the Solicitor General to explain whether the President actu-

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[7] This construction seems to have rendered irrelevant the statutory phrase "owned or possessed by such person [or] by any other party or entity." On the Ninth Circuit's view, omission of that language does not alter the ambit of the statute. But this Court has long held that that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) (internal quotation omitted).

ally supports such an unprecedented, and potentially deleterious, expansion of American authority, in derogation of the statute enacted by Congress and the canons of construction adopted by this Court.

Respectfully submitted.

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February 27, 2007

APPENDIX

APPENDIX A

Joseph A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; Donald R. Michel, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; State of Washington, Plaintiffs–Appellees,

v.

TECK COMINCO METALS, LTD., a Canadian corporation, Defendant–Appellant.

No. 05–35153.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Dec. 5, 2005.

Filed July 3, 2006.

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Rex S. Heinke, Akin Gump Strauss Hauer & Feld LLP, Los Angeles, CA, for amici Canadian Chamber of Commerce and the Mining Association of Canada.

Brian Hembacher, Deputy Attorney General, Los Angeles, CA, for amici People of the State of California ex rel. Bill Lockyer, Attorney General for the State of California, and the States of Arizona, Idaho, Montana and Oregon.

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Rob Roy Smith, Morisset Schlosser Jozwiak & McGaw, Seattle, WA, for amicus Okanagan National Alliance in support of plaintiffs-appellees.

Catherine E. Stetson, Hogan & Hartson LLP, Washington, D.C., for amici National Mining Association and the National Association of Manufacturers.

Martin Wagner, Earthjustice, Oakland, CA, for amici Sierra Club and Sierra Club of Canada.

Shannon D. Work, Funke & Work, Coeur d'Alene, ID, for amicus Spokane Tribe of Indians.

Appeal from the United States District Court for the Eastern District of Washington; Alan A. McDonald, Senior District Judge, Presiding. D.C. No. CV–04–00256–AAM.

Before: RONALD M. GOULD and MARSHA S. BERZON, Circuit Judges, and WILLIAM W SCHWARZER,* District Judge.

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* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

GOULD, Circuit Judge:

Joseph A. Pakootas and Donald R. Michel (collectively "Pakootas") filed suit to enforce a Unilateral Administrative Order (Order) issued by the United States Environmental Protection Agency (EPA) against Teck Cominco Metals, Ltd. (Teck), a Canadian corporation. The Order requires Teck to conduct a remedial investigation/feasibility study (RI/FS) in a portion of the Columbia River entirely within the United States, where hazardous substances disposed of by Teck have come to be located. We decide today whether a citizen suit based on Teck's alleged noncompliance with the Order is a domestic or an extraterritorial application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675. Further, we address Teck's argument that it is not liable for having "arranged for disposal" of hazardous substances because it disposed of the hazardous substances itself, rather than arranging for disposal "by any other party or entity." § 9607(a)(3).[1] We hold that because CERCLA liability is triggered by an actual or threatened release of hazardous substances, and because a release of hazardous substances took place within the United States, this suit involves a domestic application of CERCLA. Further, we reject Teck's contention that it is not liable under § 9607(a)(3) because it disposed of the hazardous substances itself.

I

We consider an interlocutory appeal of the denial of Teck's motion to dismiss.[2] In August of 1999, the Colville Tribes petitioned the EPA under § 9605 to conduct an as-

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[1] Unless otherwise indicated, statutory citations herein are to Title 42 of the United States Code.

[2] Because this appeal follows denial of a motion to dismiss, we take the facts as stated in the complaint as true and in the light most favorable to Pakootas. *See Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996).

sessment of hazardous substance contamination in and along the Columbia River in northeastern Washington state. The EPA began the site assessment in October 1999, and found contamination that included "heavy metals such as arsenic, cadmium, copper, lead, mercury and zinc." *In re Upper Columbia River Site*, Docket No. CERCLA–10–2004–0018, at 2 (Unilateral Administrative Order for Remedial Investigation/Feasibility Study Dec. 11, 2003), *available at* http://yosemite.epa.gov/R10/CLEANUP.NSF/UCR/Enforcement [hereinafter UAO]. The "EPA also observed the presence of slag, a by-product of the smelting furnaces, containing glassy ferrous granules and other metals, at beaches and other depositional areas at the Assessment Area." *Id.* at 2–3. The EPA completed its site assessment in March of 2003, and concluded that the Upper Columbia River Site (the Site)[3] was eligible for listing on the National Priorities List (NPL).[4]

Teck owns and operates a lead-zinc smelter ("Trail Smelter") in Trail, British Columbia.[5] Between 1906 and

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[3] The "Upper Columbia River Site" includes "the areal extent of contamination in the United States associated with the Upper Columbia River, and all suitable areas in proximity to the contamination necessary for implementation of a response action." UAO at 2.

[4] The NPL "is a compilation of uncontrolled hazardous substances releases in the United States that are 'priorities' for long-term evaluation and response." 4 William H. Rodgers, Jr., *Environmental Law: Hazardous Wastes and Substances* § 8.7(C) (Supp. 2005). "Inclusion of a site or facility on the list requires no action, assigns no liability, and does not pass judgment on the owner or operator. . . . [T]he key consequence of being listed is that only NPL sites qualify for [Superfund]-financed remedial action." *Id.*

[5] This is not the first time the Trail Smelter has been in a dispute over transboundary environmental pollution. *See generally* Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail for CERCLA*, 14 N.Y.U. Envtl. L.J. 233, 241–53 (2006) (describing factual and procedural background of the Trail Smelter Arbitration, which concerned sulfur dioxide emissions from the Trail Smelter that migrated into the United States in the early twentieth century).

1995, Teck generated and disposed of hazardous materials, in both liquid and solid form, into the Columbia River. These wastes, known as "slag," include the heavy metals arsenic, cadmium, copper, mercury, lead, and zinc, as well as other unspecified hazardous materials. Before mid–1995, the Trail Smelter discharged up to 145,000 tons of slag annually into the Columbia River. Although the discharge took place within Canada, the EPA concluded that Teck

> has arranged for the disposal of its hazardous substances from the Trail Smelter into the Upper Columbia River by directly discharging up to 145,000 tonnes of slag annually prior to mid–1995. Effluent, such as slag, was discharged into the Columbia River through several outfalls at the Trail Smelter. . . . The slag was carried downstream in the passing river current and settled in slower flowing quiescent areas.[6]

Id. at 3. A significant amount of slag has accumulated and adversely affects the surface water, ground water, sediments, and biological resources of the Upper Columbia River and Lake Roosevelt. Technical evidence shows that the Trail Smelter is the predominant source of contamination at the Site. The physical and chemical decay of slag is an ongoing process that releases arsenic, cadmium, copper, zinc, and lead

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[6] The complaint alleges that the Trail Smelter discharged up to 145,000 tons of slag annually, but the EPA alleges that the Trail Smelter discharged up to 145,000 tonnes annually. A "ton" is equivalent to 2,000 pounds. A "tonne," or metric ton, is equivalent to 1,000 kilograms, or 2,205 pounds. Thus, 145,000 tonnes, each with 205 pounds more than an American "ton," is equivalent to about 160,000 tons. Either way, the Trail Smelter discharged a ton of slag in the colloquial sense, and the difference between the two figures is immaterial for our purposes. Because we take the facts as alleged by Pakootas, we use his figure of 145,000 tons.

into the environment, causing harm to human health and the environment.

After the EPA determined that the Site was eligible for listing on the NPL, it evaluated proposing the Site for placement on the NPL for the purpose of obtaining federal funding for evaluation and future cleanup. At that time Teck Cominco American, Inc. (TCAI)[7] approached the EPA and expressed a willingness to perform an independent, limited human health study if the EPA would delay proposing the Site for NPL listing. The EPA and TCAI entered into negotiations, which reached a stalemate when the parties could not agree on the scope and extent of the investigation that TCAI would perform. The EPA concluded that TCAI's proposed study would not provide the information necessary for the EPA to select an appropriate remedy for the contamination, and as a result the EPA issued the Order on December 11, 2003. The Order directed Teck to conduct a RI/FS[8] under CERCLA for the Site. To date Teck has not complied with the Order, and the EPA has not sought to enforce the Order.

Pakootas filed this action in federal district court under the citizen suit provision of CERCLA. § 9659(a)(1). Pakootas sought a declaration that Teck has violated the Order, injunctive relief enforcing the Order against Teck, as well as penalties for non-compliance and recovery of costs and fees. Teck moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) for failure to

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[7] TCAI is a wholly-owned American subsidiary of Teck.

[8] "The purpose of the remedial investigation/feasibility study (RI/FS) is to assess site conditions and evaluate alternatives to the extent necessary to select a remedy. Developing and conducting an RI/FS generally includes the following activities: project scoping, data collection, risk assessment, treatability studies, and analysis of alternatives. The scope and timing of these activities should be tailored to the nature and complexity of the problem and the response alternatives being considered." 40 C.F.R. § 300.430(a)(2).

state a cause of action under CERCLA and lack of subject matter jurisdiction, on the ground that the district court could not enforce the Order because it was based on activities carried out by Teck in Canada. Teck also moved to dismiss for lack of personal jurisdiction over Teck, a Canadian corporation with no presence in the United States. After Teck filed its motion to dismiss, the State of Washington moved to intervene as of right as a plaintiff in the action. The district court granted the motion to intervene, and considered Teck's pending motion to dismiss to apply to both Pakootas's complaint and the State of Washington's complaint-in-intervention.

The district court denied Teck's motion to dismiss. It held that because the case arises under CERCLA "there is a federal question which confers subject matter jurisdiction on this court." Because there was a federal question, and because Pakootas's claims were not insubstantial or frivolous, the district court held that dismissal under Federal Rule of Civil Procedure 12(b)(1) was inappropriate. The district court also held that "[t]he facts alleged in plaintiffs' complaints establish this court's specific, limited personal jurisdiction over the defendant."

Much of district court's order was devoted to analyzing Teck's argument that the suit involved an impermissible extraterritorial application of CERCLA, and thus whether dismissal for failure to state a claim under CERCLA was appropriate. The district court first acknowledged that "there is some question whether this case really involves an extraterritorial application of CERCLA." However, the district court assumed that the case involved an extraterritorial application of CERCLA, and considered whether extraterritorial application was permissible here.

In addressing the question of extraterritorial application, the district court acknowledged that "Congress has the authority to enforce its laws beyond the territorial boundaries of

the United States," but that it is "a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " (quoting *EEOC v. Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991)). However, the district court concluded that the presumption against extraterritoriality was overcome here, because

> there is no doubt that CERCLA affirmatively expresses a clear intent by Congress to remedy 'domestic conditions' within the territorial jurisdiction of the U.S. That clear intent, combined with the well-established principle that the presumption [against extraterritoriality] is not applied where failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States, leads this court to conclude that extraterritorial application of CERCLA is appropriate in this case.

Further, the district court held that Teck was a "person" under the meaning of § 9601(21), and held that Teck's liability as a "generator" of hazardous waste and/or as an "arranger" of the disposal of hazardous waste could not be ruled out under § 9607(a)(3).[9]

The district court *sua sponte* certified its order for immediate appeal to us pursuant to 28 U.S.C. § 1292(b). There-

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[9] CERCLA defines an arranger as:

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.

§ 9607(a)(3).

after, Teck petitioned for permission to appeal, which we granted. While Teck's petition for permission to appeal was pending before us, the district court granted Teck's motion to stay further proceedings in the district court pending the outcome of this interlocutory appeal.[10]

On this appeal, Teck does not challenge the district court's determination that it had personal jurisdiction over Teck. And although Teck "disputes the conclusion" that the district court had subject matter jurisdiction to hear the case, it does not argue in its briefing that the district court was without subject matter jurisdiction. Rather, Teck argues that the district court should have dismissed Pakootas's complaint

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[10] After this appeal was submitted for decision, Teck filed a request for us to take judicial notice of a settlement agreement between Teck and EPA, in which the EPA agreed to withdraw the Order that is the subject of this appeal. Neither Pakootas nor the State of Washington, who are the plaintiff and plaintiff-intervenor in this litigation, was a party to the settlement agreement. We take notice that the settlement between Teck and the EPA was reached, but we do not take notice of supplemental arguments urged by Teck relating to the agreement.

The parties are agreed that the settlement between Teck and the EPA does not render this action moot. Teck argues that this settlement renders moot Pakootas's claims for injunctive relief to enforce the Order and for declaratory relief that Teck is in violation of the Order, but that Pakootas's claims for civil penalties "for each day" that Teck violated the Order and for attorneys' fees, are not moot. Pakootas disputes that the settlement is self-executing and that it necessarily renders moot the claims for injunctive and declaratory relief. For purposes of this appeal, it is sufficient for us to note that Pakootas's claims for civil penalties and for attorneys' fees are not moot, and that we must proceed to decision of the appeal. On remand, we leave for the district court to decide in the first instance whether the claims for injunctive and declaratory relief are moot.

We further deny Teck's request for us to take judicial notice on this appeal of the following documents: (1) Order Granting Motions to Lift Stay, issued by the district court on October 25, 2005; (2) Plaintiffs' Amended Complaint, filed November 7, 2005; and (3) State of Washington's First Amended Complaint in Intervention, filed November 4, 2005.

under Federal Rule of Civil Procedure 12(b)(6) for two reasons. First, Teck argues that to apply CERCLA to Teck's activities in Canada would be an impermissible extraterritorial application of United States law. Second, Teck argues that it is not liable as a person who "arranged for disposal" of hazardous substances under § 9607(a)(3).

II

We review de novo a district court's decision on a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Decker v. Advantage Fund Ltd.*, 362 F.3d 593, 595–96 (9th Cir. 2004). We review questions of law de novo. *Torres–Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997).

III

We begin by considering how this litigation fits within the CERCLA statutory framework. CERCLA sets forth a comprehensive scheme for the cleanup of hazardous waste sites, and imposes liability for cleanup costs on the parties responsible for the release or potential release of hazardous substances into the environment. *See Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir. 1997); *see also Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990) (stating that "two … main purposes of CERCLA" are "prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party") (cited with approval in *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996)).

To ensure the prompt cleanup of hazardous waste sites, CERCLA gives four options to the EPA:[11] (1) the EPA can investigate and remediate hazardous waste sites itself under §

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[11] CERCLA vests this authority in the President, who in turn has delegated most of his functions and responsibilities to the EPA. *See* 40 C.F.R. § 300.100.

9604, and later seek to recover response costs from the potentially responsible parties (PRPs) under § 9607; (2) the EPA can initiate settlement negotiations with PRPs under § 9622; (3) the EPA can file suit in federal district court to compel the PRPs to abate the threat if there is an "imminent and substantial" threat to public health or welfare under § 9606(a); or (4) the EPA can issue orders directing the PRPs to clean up the site under § 9606(a). In this case, the EPA chose the fourth approach, and issued the Order to Teck under § 9606(a).

If a party receives an order and refuses to comply, enforcement options are available. *See generally Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 387 (8th Cir. 1987). First, the EPA may bring an action in federal district court to compel compliance, using the contempt powers of the district court as a potential sanction for non-compliance. § 9606(a). Second, the EPA may bring an action in federal district court seeking to impose fines of up to $25,000 for each day that the party fails to comply with the order. § 9606(b)(1). Third, the EPA may initiate cleanup of the facility itself under § 9604, and the party responsible for the pollution is potentially liable for the response and cleanup costs, plus treble damages. § 9607(c)(3).

Here, the EPA has not sought to enforce the Order through any of the mechanisms described above.[12] Rather, Pakootas initiated this suit in federal district court under § 9659, the citizen suit provision of CERCLA. Section 9659(a)(1) provides a cause of action for any person to commence a civil action "against any person . . . who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter." Section 9659(c) gives the district court the

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[12] So far as we can tell from the record, the EPA did not take any formal action against Teck between issuing the Order on December 11, 2003 and settling with Teck on June 2, 2006.

power "to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation." Further, § 9613(h)(2), the "timing of review" provision of CERCLA, grants federal courts jurisdiction to review an order issued under § 9606(a) when a party seeks to enforce the order.

Having placed this litigation in context, we turn to the merits.

IV

Teck's primary argument is that, in absence of a clear statement by Congress that it intended CERCLA to apply extraterritorially, the presumption against extraterritorial application of United States law precludes CERCLA from applying to Teck in Canada. We need to address whether the presumption against extraterritoriality applies only if this case involves an extraterritorial application of CERCLA. So a threshold question is whether this case involves a domestic or extraterritorial application of CERCLA.

Unlike other environmental laws such as the Clean Air Act, 42 U.S.C. §§ 7401–7671q, Clean Water Act, 33 U.S.C. §§ 1251–1387, and Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k, CERCLA is not a regulatory statute. Rather, CERCLA imposes liability for the cleanup of sites where there is a release or threatened release of hazardous substances into the environment. *See Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 881 (9th Cir. 2001) (en banc) ("CERCLA holds a PRP liable for a disposal that 'releases or threatens to release' hazardous substances into the environment."). CERCLA liability attaches when three conditions are satisfied: (1) the site at which there is an actual or threatened release of hazardous substances is a "facility" under § 9601(9); (2) a "release" or "threatened release" of a hazardous substance from the facility has oc-

curred, § 9607(a)(4); and (3) the party is within one of the four classes of persons subject to liability under § 9607(a).[13]

CERCLA defines the term "facility" as, in relevant part, "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." § 9601(9). The Order defines the "facility" in this case as the Site, which is described as the "extent of contamination *in the United States* associated with the Upper Columbia River." UAO at 2 (emphasis added); *see also* UAO at 5 ("The Upper Columbia River Site is a 'facility' as defined in Section 101(9) of CERCLA, 42 U.S.C.

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[13] There is a question whether the elements of CERCLA liability outlined in § 9607(a) are the same elements that the EPA must allege when issuing an order under § 9606(a). That is, § 9606(a) authorizes the EPA to issue "such orders as may be necessary to protect public health and welfare and the environment," but does not specify exactly what the EPA must allege before issuing such orders. Section 9606(b)(1) states that the EPA can seek fines for non-compliance in federal district court unless the person who refuses to comply with the order has "sufficient cause."

The Eighth Circuit, the only federal court of appeals to address the issue, has held that "sufficient cause" includes a defense that "the applicable provisions of CERCLA, EPA regulations and policy statements, and any formal or informal hearings or guidance the EPA may provide, give rise to an objectively reasonable belief in the invalidity or inapplicability of the clean-up order." *Solid State Circuits*, 812 F.2d at 392. We need not here decide whether a party that is not liable under § 9607(a) necessarily has "sufficient cause" to refuse to comply with an order issued under § 9606(a) because, as we hold below, Teck is potentially liable under § 9607(a).

However, one element of § 9607(a) liability does not apply here. In private cost recovery actions under § 9607(a), the claimant must incur response costs that are both "necessary" and "consistent with the national contingency plan." § 9607(a)(4). *See Carson Harbor Vill.*, 270 F.3d at 871–72. Because Pakootas filed a citizen suit under § 9659 rather than a private cost recovery action under § 9607(a), the requirement that a private party incur response costs before filing suit does not apply here.

§ 9601(9).").[14] The slag has "come to be located" at the Site, and the Site is thus a facility under § 9601(a). *See 3550 Stevens Creek Assocs. v. Barclays Bank of California*, 915 F.2d 1355, 1360 n.10 (9th Cir. 1990) ("[T]he term facility has been broadly construed by the courts, such that in order to show that an area is a facility, the plaintiff need only show that a hazardous substance under CERCLA is placed there or has otherwise come to be located there." (internal quotation marks omitted)). The Order defines the facility as being entirely within the United States, and Teck does not argue that the Site is not a CERCLA facility. Because the CERCLA facility is within the United States, this case does not involve an extraterritorial application of CERCLA to a facility abroad. The theory of Pakootas's complaint, seeking to enforce the terms of the Order to a "facility" within the United States, does not invoke extraterritorial application of United States law precisely because this case involves a domestic facility.

The second element of liability under CERCLA is that there must be a "release" or "threatened release" of a hazardous substance from the facility into the environment. *See* § 9607(a)(4). To determine if there is an actual or threatened release here, we consider the statutory definition of release. CERCLA defines a "release," with certain exceptions not relevant here, as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." § 9601(22).

Here, several events could potentially be characterized as releases. First, there is the discharge of waste from the Trail Smelter into the Columbia River in Canada. Second,

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[14] Because the EPA and Pakootas in seeking enforcement of the EPA's order do not characterize either the Trail Smelter or the Columbia River in Canada as a facility, we need not and do not reach whether these sites are facilities for purposes of CERCLA.

there is the discharge or escape of the slag from Canada when the Columbia River enters the United States. And third, there is the leaching of heavy metals and other hazardous substances from the slag into the environment at the Site. Although each of these events can be characterized as a release, CERCLA liability does not attach unless the "release" is from a CERCLA facility.

Here, as noted, the Order describes the facility as the Site; not the Trail Smelter in Canada or the Columbia River in Canada. Pakootas has alleged that the leaching of hazardous substances from the slag that is in the Site is a CERCLA release, and Teck has not argued that the slag's interaction with the water and sediment of the Upper Columbia River is not a release within the intendment of CERCLA. Our precedents establish that the passive migration of hazardous substances into the environment from where hazardous substances have come to be located is a release under CERCLA. *See A & W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1111 (9th Cir. 1998) (holding that wind blowing particles of hazardous substances from a pile of waste was a CERCLA release); *United States v. Chapman*, 146 F.3d 1166, 1170 (9th Cir. 1998) (affirming summary judgment where the Government presented evidence that corroding drums were leaking hazardous substances into the soil); *see also Coeur d'Alene Tribe v. Asarco, Inc.*, 280 F.Supp.2d 1094, 1113 (D. Idaho 2003) ("Th[e] passive movement and migration of hazardous substances by mother nature (no human action assisting in the movement) is still a 'release' for purposes of CERCLA in this case."). We hold that the leaching of hazardous substances from the slag at the Site is a CERCLA release. That release—a release into the United States from a facility in the United States—is entirely domestic.

The third element of liability under CERCLA is that the party must be a "covered person" under § 9607(a). Teck argues that it is not a covered person under § 9607(a)(3) be-

cause it has not "arranged for disposal" of a hazardous substance "by any other party or entity" as required by § 9607(a)(3), because Teck disposed of the slag itself, and without the aid of another. Alternatively, Teck argues that if it is an arranger under § 9607(a)(3), then basing CERCLA liability on Teck arranging for disposal of slag in Canada is an impermissible extraterritorial application of CERCLA.

Assuming that Teck is an arranger under § 9607(a)(3),[15] we consider whether the fact that the act of arranging in Canada for disposal of the slag makes this an extraterritorial application of CERCLA. Teck argues that because it arranged in Canada for disposal, that is, the act of arranging took place in Canada even though the hazardous substances came to be located in the United States, it cannot be held liable under CERCLA without applying CERCLA extraterritorially.

The text of § 9607(a)(3) applies to "any person" who arranged for the disposal of hazardous substances. The term "person" includes, *inter alia*, "an individual, firm, corporation, association, partnership, consortium, joint venture, [or] commercial entity." § 9601(21). On its face, this definition includes corporations such as Teck, although the definition does not indicate whether foreign corporations are covered. Teck argues that because the Supreme Court recently held that the term "any court" as used in 18 U.S.C. § 922(g)(1) does not include foreign courts, we should interpret the term "any person" so as not to include foreign corporations. *See Small v. United States*, 544 U.S. 385, 390-91, 125 S.Ct. 1752, 161 L.Ed.2d 651 (2005).

The decision in *Small* was based in part on *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 4 L.Ed. 471 (1818), in which Chief Justice Marshall held for the Court that the words "any person or persons," as used in a statute prohibit-

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15 We address in the next section Teck's contention that it is not a person for § 9607(a) purposes because it has not "arranged for disposal" of hazardous substances "by any other party or entity."

ing piracy on the high seas, "must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them." *Id.* at 631. The Court held that "any person or persons" did not include crimes "committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state." *Id.* at 633–34. However, the Court held that even though the statute did not specifically enumerate foreign parties as "persons," the statute did apply to punish piracy committed by foreign parties against vessels belonging to subjects of the United States. *See id.*

Palmer relied upon two benchmarks for determining whether terms such as "any person" apply to foreign persons: (1) the state must have jurisdiction over the party, and (2) the legislature must intend for the term to apply. *See id.* at 631. Regarding jurisdiction, Teck argued in the district court that there was no personal jurisdiction over it. The district court held that there was personal jurisdiction, and Teck has not appealed that determination. Because a party can waive personal jurisdiction, we are not required to consider it *sua sponte*. *See Smith v. Idaho*, 392 F.3d 350, 355 n.3 (9th Cir. 2004) (citing the "longstanding rule that personal jurisdiction, in the traditional sense, can be waived and need not be addressed *sua sponte*"). Nevertheless, we agree with the district court that there is specific personal jurisdiction over Teck here.[16] Because there is specific personal jurisdiction

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16 We do not decide whether there is general personal jurisdiction over Teck. Rather, we adopt the district court's conclusion that there is specific personal jurisdiction over Teck here, based on Washington State's long-arm statute, which applies to "the commission of a tortious act" within Washington, Wash. Rev. Code § 4.28.185, and our case law holding that "personal jurisdiction can be predicated on (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suf-

over Teck here based on its allegedly tortious act aimed at the state of Washington, the first *Palmer* benchmark is satisfied, and we can appropriately construe the term "any person" to apply to Teck.

The second *Palmer* benchmark is that the legislature must intend for the statute to apply to the situation. Except for the statutory definition of "any person," CERCLA is silent about *who* is covered by the Act. But CERCLA is clear about what is covered by the Act. CERCLA liability attaches upon release or threatened release of a hazardous substance into the environment. CERCLA defines "environment" to include "any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air *within the United States or under the jurisdiction of the United States*." § 9601(8) (emphasis added). CERCLA's purpose is to promote the cleanup of hazardous waste sites where there is a release or threatened release of hazardous substances into the environment within the United States. *See ARC Ecology v. U.S. Dep't of the Air Force*, 411 F.3d 1092, 1096–98 (9th Cir. 2005) (citing legislative history demonstrating that Congress intended CERCLA to apply to cleanup hazardous waste sites in the United States). Because the legislature intended to hold parties responsible for hazardous waste sites that release or threaten release of hazard-

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fered—in the forum state." *See Core–Vent Corp. v. Nobel Inds. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993).

AT & T v. Compagnie Bruxelles Lambert, 94 F.3d 586 (9th Cir. 1996), is not to the contrary. There, AT & T claimed that Compagnie Bruxelles Lambert was liable under CERCLA because its subsidiary operated a site from which hazardous substances were released. *Id.* at 590–91. We held that there was no specific jurisdiction over the parent company because (1) the parent company had insufficient independent contacts with the United States to establish personal jurisdiction, and (2) the subsidiary was not acting as the parent company's alter ego. *Id.* Here, Teck has sufficient *independent* personal contacts with the forum state to justify specific personal jurisdiction.

ous substances into the United States environment, the second *Palmer* benchmark is satisfied here.

Although the *Palmer* analysis supports the proposition that CERCLA applies to Teck, *Palmer* of course does not address the distinction between domestic or extraterritorial application of CERCLA. The *Palmer* analysis, however, in what we have termed its second benchmark, brings to mind the "domestic effects" exception to the presumption against extraterritorial application of United States law. *See Steele v. Bulova Watch Co.*, 344 U.S. 280, 287–88, 73 S.Ct. 252, 97 L.Ed. 319 (1952) (finding jurisdiction in a trademark suit against a person in Mexico who manufactured counterfeit Bulova watches that then entered and caused harm within the United States). The difference between a domestic application of United States law and a presumptively impermissible extraterritorial application of United States law becomes apparent when we consider the conduct that the law prohibits. In *Steele* the prohibited conduct, the unauthorized use and reproduction of Bulova's registered trademark, took place in Mexico but the harm, the dilution of Bulova's trademark, took place in the United States. *Id.* at 287, 73 S.Ct. 252. The Court therefore held that there was jurisdiction in that case.

Here, the operative event creating a liability under CERCLA is the release or threatened release of a hazardous substance. *See* § 9607(a)(4). Arranging for disposal of such substances, in and of itself, does not trigger CERCLA liability, nor does actual disposal of hazardous substances.[17] A

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[17] The terms "disposal" and "release" are each defined in CERCLA. "Disposal" is defined by reference to RCRA § 6903(3), which defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." CERCLA defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the envi-

release must occur or be threatened before CERCLA is triggered. A party that "arranged for disposal" of a hazardous substance under § 9607(a)(3) does not become liable under CERCLA until there is an actual or threatened release of that substance into the environment. Arranging for disposal of hazardous substances, in itself, is neither regulated under nor prohibited by CERCLA. Further, disposal activities that were legal when conducted can nevertheless give rise to liability under § 9607(a)(3) if there is an actual or threatened release of such hazardous substances into the environment. *See Cadillac Fairview/California, Inc. v. United States* (*Cadillac Fairview/California I*), 41 F.3d 562, 565–66 (9th Cir. 1994) (holding that a party that sold a product to another party "arranged for disposal" of a hazardous substance); *Cadillac Fairview/California, Inc. v. Dow Chem. Co.* (*Cadillac Fairview/California II*), 299 F.3d 1019, 1029 (9th Cir. 2002) (characterizing the conduct at issue in *Cadillac Fairview/California I* as "legal at the time").

The location where a party arranged for disposal or disposed of hazardous substances is not controlling for purposes of assessing whether CERCLA is being applied extraterritorially, because CERCLA imposes liability for releases or threatened releases of hazardous substances, and not merely for disposal or arranging for disposal of such substances.[18]

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ronment . . . ." § 9601(22). "[F]rom these definitions, we can conclude that 'release' is broader than 'disposal,' because the definition of 'release' includes 'disposing' (also, it includes 'passive' terms such as 'leaching' and 'escaping,' which are not included in the definition of 'disposal')." *Carson Harbor Vill.*, 270 F.3d at 878.

[18] CERCLA is a strict liability statute, and liability can attach even when the generator has no idea how its waste came to be located at the facility from which there was a release. *See O'Neil v. Picillo*, 883 F.2d 176, 183 & n.9 (1st Cir. 1989). The three statutory defenses enumerated in § 9607(b), including defenses for "an act of God," "an act of war," or "an act or omission of a third party other than an employee or agent of the defendant," are "the only [defenses] available, and . . . the traditional eq-

Because the actual or threatened release of hazardous substances triggers CERCLA liability, and because the actual or threatened release here, the leaching of hazardous substances from slag that settled at the Site, took place in the United States, this case involves a domestic application of CERCLA.

Our conclusion is reinforced by considering CERCLA's place within the constellation of our country's environmental laws, and contrasting it with RCRA:

> Unlike [CERCLA], RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards. RCRA's primary purpose, rather, is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, "so as to minimize the present and future threat to human health and the environment."

Meghrig, 516 U.S. at 483, 116 S.Ct. 1251 (quoting § 9602(b)) (internal citation omitted). RCRA regulates the generation and disposal of hazardous waste, whereas CERCLA imposes liability to clean up a site when there are actual or threatened releases of hazardous substances into the envi-

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uitable defenses are not." *California ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661, 672 (9th Cir. 2004). There is no requirement that the generator of hazardous substances intend that the waste come to be located at a CERCLA facility. "In the case of an actual release, the plaintiff need only prove that the defendant's hazardous materials were deposited at the site, that there was a release at the site, and that the release caused it to incur response costs." *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 287 F.Supp.2d 1118, 1186 (C.D. Cal. 2003) *aff'd sub nom. Carson Harbor Vill., Ltd. v. County of Los Angeles*, 433 F.3d 1260 (9th Cir. 2006).

ronment. It is RCRA, not CERCLA, that governs prospectively how generators of hazardous substances should dispose of those substances, and it is the Canadian equivalent of RCRA, not CERCLA, that regulates how Teck disposes of its waste within Canada.

Here, the district court assumed, but did not decide, that this suit involved extraterritorial application of CERCLA because "[t]o find there is not an extraterritorial application of CERCLA in this case would require reliance on a legal fiction that the 'releases' of hazardous substances into the Upper Columbia River Site and Lake Roosevelt are wholly separable from the discharge of those substances into the Columbia River at the Trail Smelter." However, what the district court dismissed as a "legal fiction" is the foundation of the distinction between RCRA and CERCLA. If the Trail Smelter were in the United States, the discharge of slag from the smelter into the Columbia River would potentially be regulated by RCRA and the Clean Water Act. And that prospective regulation, if any, would be legally distinct from a finding of CERCLA liability for cleanup of actual or threatened releases of the hazardous substances into the environment from the disposal site, here the Upper Columbia River Site. That the Trail Smelter is located in Canada does not change this analysis, as the district court recognized.

CERCLA is only concerned with imposing liability for cleanup of hazardous waste disposal sites where there has been an actual or threatened release of hazardous substances into the environment. CERCLA does not obligate parties (either foreign or domestic) liable for cleanup costs to cease the disposal activities such as those that made them liable for cleanup costs; regulating disposal activities is in the domain of RCRA or other regulatory statutes.

We hold that applying CERCLA here to the release of hazardous substances at the Site is a domestic, rather than an extraterritorial application of CERCLA, even though the

original source of the hazardous substances is located in a foreign country.

V

We next address Teck's only other argument—that it is not covered by § 9607(a)(3) because it has not "arranged for disposal . . . of hazardous substances . . . by any other party or entity" because, if the facts in the complaint are taken as true, Teck disposed of the slag itself. Preliminarily, we note that neither Pakootas, nor the Order, specifically allege that Teck is an arranger under § 9607(a)(3). Rather, the Order states that Teck is a "responsible party under Sections 104, 107, and 122 of CERCLA, 42 U.S.C. §§ 9604, 9607, and 9622." UAO at 6. The parties have, however, focused in their arguments solely on § 9607(a)(3).[19]

Section 9607(a)(3) holds liable parties that arranged for the disposal of hazardous substances. It states, in relevant part, the following:

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for the transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such substances . . . shall be liable for . . .

certain costs of cleanup. § 9607(a)(3). We have previously said that "neither a logician nor a grammarian will find comfort in the world of CERCLA," *Carson Harbor Vill.*, 270 F.3d at 883, a statement that applies with force to § 9607(a)(3). Section 9607(a)(3) does not make literal or

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[19] The parties have not briefed or argued whether Teck may be liable under § 9607(a)(1), (2), or (4). We accordingly express no opinion on whether Teck may be liable under these subsections.

grammatical sense as written. It is by no means clear to what the phrase "by any other party or entity" refers. Pakootas argues that it refers to a party who owns the waste; and Teck argues that it refers to a party who arranges for disposal with the owner. To make sense of the sentence we might read the word "or" into the section, which supports Pakootas's position, or we might delete two commas, which supports Teck's position. Neither construction is entirely felicitous.

Section 9607(a)(3)'s phrase "by any other party or entity" can be read to refer to "hazardous substances owned or possessed by such person," such that parties can be liable if they arranged for disposal of their own waste or if they arranged for disposal of wastes owned "by any other party or entity." This would mean that a party need not own the waste to be liable as an arranger. But it would require reading the word "or" into the provision, so that the relevant language would read "any person who . . . arranged for disposal or treatment . . . of hazardous substances **owned** or possessed **by such person [or] by any other party or entity . . . .**" We followed this approach in *Cadillac Fairview/California I*, where we said with forcible reasoning:

> Liability is not limited to those who own the hazardous substances, who actually dispose of or treat such substances, or who control the disposal or treatment process. The language explicitly extends liability to persons "otherwise arrang[ing]" for disposal or treatment of hazardous substances whether owned by the arranger or "by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity."

41 F.3d at 565 (quoting § 9607(a)(3)) (alteration in original); *see also Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 659 (6th Cir. 2000) (holding that defendant was potentially liable as an arranger when it discharged hazardous substances into a river).

The text of § 9607(a)(3) can also be modified to support a different meaning, the one that Teck advances on this appeal. Teck argues that the phrase "by any other party or entity" refers to "or otherwise arranged for disposal or treatment," and so, the argument runs, arranger liability does not attach unless one party arranged with another party to dispose of hazardous substances. If we accept this position, then a generator of hazardous substances who disposes of the waste alone and with no other participant may defeat CERCLA liability, because the generator had not "arranged" with a second party for disposal of the waste. But this interpretation would appear to require the removal of the two commas that offset the phrase "by any other party or entity," so that the relevant language would read "any person who . . . **arranged for disposal** or treatment . . . of hazardous substances owned or possessed by such person[ ] **by any other party or entity**[ ]." In *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, 976 F.2d 1338 (9th Cir. 1992) we perhaps implicitly, albeit summarily, suggested that this reading might be appropriate, stating: "Nor has [Plaintiff] alleged that [Defendant] Ferry arranged for the contaminated soil to be disposed of 'by any other party or entity' under 9607(a)(3). Ferry disposed of the soil itself by spreading it over the uncontaminated areas of the property." *Id.* at 1341; *see also Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 24 (1st Cir. 2004) ("The clause 'by any other party or entity' clarifies that, for arranger liability to attach, the disposal or treatment must be performed by another party or entity, as was the case here."). Thus it can be argued that an implication from *Kaiser Aluminum* supports Teck's view.

Teck's argument relying on implication from *Kaiser Aluminum* would create a gap in the CERCLA liability regime by allowing a generator of hazardous substances potentially to avoid liability by disposing of wastes without involving a transporter as an intermediary. If the generator disposed of the waste on the property of another, one could ar-

gue that the generator would not be liable under § 9607(a)(1) or (a)(2) because both subsections apply to the owner of a facility; as we described above the relevant facility is the site at which hazardous substances are released into the environment, not necessarily where the waste generation and dumping took place. Liability as a transporter under § 9607(a)(4) might not attach because transporter liability applies to "any person who accepts or accepted any hazardous substance for transport." Although we do not here decide the contours of transporter liability, one could argue that a generator who owns hazardous substances cannot "accept" such hazardous substances for transport because they are already held by the generator. We hesitate to endorse a statutory interpretation that would leave a gaping and illogical hole in the statute's coverage, permitting argument that generators of hazardous waste might freely dispose of it themselves and stay outside the statute's cleanup liability provisions. We think that was not what was intended by Congress's chosen language and statutory scheme.

The ambiguous phrase "by any other party or entity" cannot sensibly be read to refer both to the language urged by Pakootas and to that urged by Teck in their differing theories of statutory interpretation. In interpreting the turbid phrase and punctuation on which the parties have vigorously pressed contradictory theories, we necessarily navigate a quagmire. Yet, in the face of statutory ambiguity, § 9607(a)(3) "must be given 'a liberal judicial interpretation . . . consistent with CERCLA's overwhelmingly remedial statutory scheme.'" *Cadillac Fairview/California I*, 41 F.3d at 565 n.4 (quoting *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989) (alteration in original)).

Pakootas and the State of Washington suggest that we can resolve the inconsistent and mutually-exclusive language in *Cadillac Fairview/California I* and *Kaiser Aluminum* by dismissing as ambiguous or as dicta the statement in *Kaiser Aluminum* that "[n]or has [Plaintiff] alleged that Ferry ar-

ranged for the contaminated soil to be disposed of 'by any other party or entity' under 9607(a)(3)." 976 F.2d at 1341. The argument is that it is unclear whether we meant in *Kaiser Aluminum* that we did not need to reach the question because Plaintiff had not alleged that Ferry was an arranger, or instead that Plaintiff had alleged that Ferry was an arranger but that we rejected that interpretation.

We conclude that Pakootas and the State of Washington are correct. The two sentences from *Kaiser Aluminum* quoted above are the only two sentences in that opinion to discuss arranger liability. The opinion contains no analysis of the text of § 9607(a)(3), and does not discuss arguments for or against interpreting § 9607(a)(3) to require the involvement of another party or entity for arranger liability to attach. The ambiguous discussion of § 9607(a)(3) liability was not in our view a holding, but rather a prelude to discussing why the defendant in *Kaiser Aluminum* was potentially liable as an owner of a facility under § 9607(a)(2) or as a transporter under § 9607(a)(4). And perhaps most importantly, the statement in question may be simply a description of what was not alleged by a party, rather than our court's choice of a rule of law.

Further, the statement in *Kaiser Aluminum* bears the hallmarks of dicta. *See United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001) (en banc) (Kozinski, J., concurring) ("Where it is clear that a statement is made casually and without analysis, where the statement is uttered in passing without due consideration of the alternatives, or where it is merely a prelude to another legal issue that commands the panel's full attention, it may be appropriate to re-visit the issue in a later case.").[20]

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[20] Moreover, a characterization of the statement in *Kaiser Aluminum* as a dictum, or as merely reflecting the absence of an allegation by the plaintiff, is consistent with our preexisting circuit authority, not addressed in *Kaiser Aluminum*, which had suggested that a generator could be liable under § 9607(a)(3) even if a second party was not involved. *See Ascon*

Because we view the statement in *Kaiser Aluminum* as offhand, unreasoned, and ambiguous, rather than as an intended choice of a rule, we consider the Ninth Circuit's law to be represented by *Cadillac Fairview/California I*. And under *Cadillac Fairview/California I*, the phrase "by any other party or entity" refers to ownership of the waste, such that one may be liable under § 9607(a)(3) if they arrange for disposal of their own waste or someone else's waste, and that the arranger element can be met when disposal is not arranged "by any other party or entity." We hold instead that Teck is potentially liable under § 9607(a)(3), and we reject Teck's argument that it is not liable under § 9607(a)(3) because it did not arrange for disposal of its slag with "any other party or entity."

VI

In conclusion, we hold that the district court correctly denied Teck's motion to dismiss Pakootas's complaint for failure to state a claim, and reject Teck's arguments to the contrary. Applying CERCLA to the Site, as defined by the Order issued by the EPA, is a domestic application of CERCLA. The argument that this case presents an extraterritorial application of CERCLA fails because CERCLA liability does not attach until there is an actual or threatened release of hazardous substances into the environment; the suit concerns actual or threatened releases of heavy metals and other hazardous substances into the Upper Columbia River Site within the United States. We reject Teck's argument that it is not liable under § 9607(a)(3) because it did not arrange for disposal of hazardous substances "by any other party or entity."

AFFIRMED.

[Footnote continued from previous page]
Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1156 (9th Cir. 1989) (reversing the district court's dismissal of Ascon's complaint for failure to state a claim because Ascon alleged that "the eleven oil company defendants and four transporter defendants deposited hazardous waste onto the property").

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation and DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation,	)	No. CV-04-256-AAM
Plaintiffs,	)	**ORDER DENYING MOTION TO DISMISS**
vs.	)	
TECK COMINCO METALS, LTD., a Canadian corporation, Defendant.	)	

BEFORE THE COURT is the defendant's Motion To Dismiss (Ct. Rec. 6). The motion was heard with oral argument on November 4, 2004. Paul J. Dayton, Esq., argued on behalf of plaintiffs Pakootas and Michel. Steven J. Thiele, Esq., argued on behalf of intervenor-plaintiff, State of Washington. Gerald F. George, Esq., and Thomas A. Campbell, Esq., argued on behalf of defendant.

I. BACKGROUND

Plaintiffs Joseph A. Pakootas and Donald R. Michel are enrolled members of the Confederated Tribes of the Colville Reservation who, under the "citizen suit" provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. Section 9601 et seq., have commenced this action to enforce the Unilateral Administrative Order for Remedial Investigation/Feasibility Study (UAO) issued to defendant Teck Cominco Metals, Ltd., (TCM), on December 11, 2003 by the United States Environmental Protection Agency (EPA). The State of Washington is also a plaintiff, having intervened in the litigation as a matter of right under CERCLA.

The defendant TCM is a Canadian corporation which owns and operates a smelter in Trail, British Columbia, located approximately 10 Columbia River miles north of the United States-Canada border. The UAO directs TCM to conduct a Remedial Investigation/Feasibility Study (RI/FS) to investigate and determine the full nature of contamination at the "Upper Columbia River Site" due to materials disposed of into the Columbia River from defendant's smelter. The "Upper Columbia River Site" includes "all areas within the United States where hazardous substances from [defendant's] operations have migrated or materials containing hazardous substances have come to be placed." (UAO at p. 7, Ex. A to Defendant's Memorandum).

Defendant moves to dismiss this action, contending the court does not have subject matter jurisdiction (Fed. R. Civ. P. 12(b)(1)), does not have personal jurisdiction (Fed. R. Civ. P. 12(b)(2)), and that plaintiffs' complaints fail to state claims upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)). Specifically, defendant contends the provisions of CERCLA cannot be applied to a Canadian corporation for actions taken by that corporation which occur within Canada.

II. DISCUSSION

A. Subject Matter Jurisdiction

This case arises under CERCLA and therefore, there is a federal question which confers subject matter jurisdiction on this court. See 42 U.S.C. § 9613(b) and § 9659(c).

A claim that a right exists under federal law is enough for jurisdiction unless the claim is insubstantial or frivolous. A substantial claim that a remedy may be implied from a federal statute is enough for jurisdiction. If it is held that federal law does not provide for the remedy, the dismissal should be on the merits rather than for want of jurisdiction. *ARC Ecology*, 294 F.Supp.2d 1152, 1156 (N.D. Cal. 2003). Whether the complaint states a cause of action upon which relief could be granted is a question of law and just like issues of fact, it must be decided after and not before the court has assumed jurisdiction over the controversy. *Id.* In *ARC Ecology*, the district court found it had subject matter jurisdiction to adjudicate the novel claim that CERCLA applies extraterritorially. *Id.*

Plaintiffs' CERCLA claims are not insubstantial or frivolous. This court has subject matter jurisdiction to determine whether plaintiffs' claims seek to apply CERCLA extraterritorially and if so, whether that is permissible under CERCLA. That determination is made *infra* under Fed. R. Civ. P. 12(b)(6).

B. Personal Jurisdiction

Absent one of the traditional bases for personal jurisdiction- presence, domicile, or consent- due process requires a defendant have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154 (1945). The forum state must have a sufficient relationship with the defendants and the litigation to make it reason-

able to require them to defend the action in a federal court located in that state. The purpose of the "minimum contacts" requirement is to protect a defendant against the burdens of litigating at a distant or inconvenient forum and insure that states do not reach out beyond the limits of their sovereignty imposed by their status in a federal system. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S.Ct. 559 (1980).

The extent to which a federal court can exercise personal jurisdiction, absent the traditional bases of consent, domicile or physical presence, depends on the nature and quality of defendant's "contacts" with the forum state. If defendant's activities in the forum state are "substantial, continuous and systematic," a federal court can, if permitted by the state's long-arm statute, exercise jurisdiction as to any cause of action, even if unrelated to defendant's activities within the state. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445, 72 S.Ct. 413 (1952).

Even if a non-resident defendant's "contacts" with the forum state are not sufficiently "continuous and systematic" for general jurisdiction, the defendant may still be subject to jurisdiction on claims related to its activities there. This "limited" or "specific" personal jurisdiction requires a showing that: (1) the out-of-state defendant purposefully directed its activities toward residents of the forum state or otherwise established contacts with the forum state; (2) plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) the forum's exercise of personal jurisdiction in the particular case must be reasonable in that it must comport with "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-76, 105 S.Ct. 2174 (1985). The defendant must have purposefully directed its activities at forum residents, or purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of local law. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct.

1228 (1958). This protects against a nonresident defendant being haled into local courts solely as the result of "random, fortuitous or attenuated" contacts. *Burger King*, 471 U.S. at 475. "[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297.

Washington's long-arm statute, found at RCW 4.28.185, provides[1]:

> (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person . . . to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any said acts:
>
> (b) The commission of a tortious act within this state;
>
> . . .
>
> (3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

If a non-resident, acting entirely outside of the forum state, intentionally causes injuries within the forum state, local jurisdiction is presumptively reasonable. Under such circumstances, the defendant must "reasonably anticipate" being haled into court in the forum state. *Calder v. Jones*, 465 U.S. 783, 790, 104 S.Ct. 1482 (1984). Personal jurisdiction

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[1] A federal district court must look to the law of the forum state in determining whether it may exercise personal jurisdiction over an out-of-state defendant. *MacDonald v. Navistar International Transp. Corp.*, 143 F.Supp.2d 918 (S.D. Ohio 2001).

can be established based on: (1) intentional actions; (2) expressly aimed at the forum state; (3) causing harm, the brunt of which is suffered, and which defendant knows is likely to be suffered in the forum state. *Core-Vent Corp. v. Nobel Inds. AB*, 11 F.3d 1482, 1486 (9th Cir. 1994). The "express aiming" requirement is satisfied when it is alleged the nonresident engaged in "wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000).

The facts alleged in the individual plaintiffs' complaint and the State of Washington's complaint-in-intervention satisfy this three-part test.[2] The complaints allege that from approximately 1906 to mid-1995, defendant generated and disposed of hazardous substances directly into the Columbia River and that these substances were carried downstream into the waters of the United States where they have eventually accumulated and cause continuing impacts to the surface water and ground water, sediments, and biological resources which comprise the Upper Columbia River and Franklin D. Roosevelt Lake. The allegation is that disposing of hazardous substances into the Columbia River is an intentional act expressly aimed at the State Washington in which the Upper Columbia River and Franklin D. Roosevelt Lake are located. This disposal causes harm which defendant knows is likely to

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[2] Although defendant is the moving party on a motion to dismiss for lack of personal jurisdiction, plaintiffs are the ones who invoked the court's jurisdiction and bear the burden of proving the necessary jurisdictional facts. *Flynt Distrib. Co., Inc., v. Harvey*, 734 F.2d 1389, 1392 (9th Cir. 1984). Motions to dismiss under Rule 12(b)(2) may test either the plaintiff's theory of jurisdiction or the facts supporting the theory. In evaluating plaintiffs' jurisdictional theory, the court need only determine whether the facts alleged, if true, are sufficient to establish jurisdiction. No evidentiary hearing or factual determination is necessary. *Credit Lyonnais Securities (USA), Inc. v. Alcantara*, 183 F.3d 151, 153 (2nd Cir. 1999).

be suffered downstream by the State of Washington and those individuals, such as Pakootas and Michel, who fish and recreate in the Upper Columbia River and Lake Roosevelt.

The burden is on the defendant to prove the forum's exercise of jurisdiction would not comport with "fair play and substantial justice." *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851-52 (9th Cir. 1993). If a nonresident has deliberately engaged in significant activities within the forum state, "it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Burger King*, 471 U.S. at 476. Furthermore, if defendant "purposefully had directed his activities at forum residents . . . he must present a compelling case" that the exercise of jurisdiction would in fact be unreasonable. *Id.* at 477.

In determining the "reasonableness" of exercising personal jurisdiction, the following factors must be considered: (1) the extent of defendant's purposeful interjection; (2) the burden on defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution to the controversy; (6) the importance of the forum to plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *Core-Vent*, 11 F.3d at 1487-88. No one factor is dispositive and the court must balance all of the factors. *Id.* at 1488. The "reasonableness" requirement may defeat local jurisdiction even if defendant has purposefully engaged in forum-related activities. *Burger King*, 471 U.S. at 477-78.

The exercise of jurisdiction over defendant TCM does not offend traditional notions of fair play and substantial justice. The burden on defendant in defending in this forum is not great. Trail, B.C. is located approximately 10 miles from the Eastern District of Washington. For reasons discussed below, the court finds the exercise of personal jurisdiction

over defendant does not create any conflicts with Canadian sovereignty. It is obvious the State of Washington has a significant interest in adjudicating this dispute, as evidenced by its intervention as a plaintiff, and venue is proper here under CERCLA (42 U.S.C. § 9613(b) and § 9659(b)(1)).

The facts alleged in plaintiffs' complaints establish this court's specific, limited personal jurisdiction over the defendant.

C. Failure To State A Claim

A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). In reviewing a 12(b)(6) motion, the court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from such allegations. *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457, 460 (9th Cir. 1994); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The sole issue raised by a 12(b)(6) motion is whether the facts pleaded, if established, would support a claim for relief; therefore, no matter how improbable those facts alleged are, they must be accepted as true for purposes of the motion. *Neitzke v. Williams*, 490 U.S. 319, 326-27, 109 S.Ct. 1827 (1989).

Defendant contends the UAO cannot be enforced against a Canadian corporation based on conduct which occurred in Canada. At the outset, there is some question whether this case really involves an extraterritorial application of CERCLA, notwithstanding that defendant is a Canadian corporation and its Trail, B.C. smelter is allegedly the source of hazardous substances which have by means of the Columbia River migrated into the Upper Columbia River and Lake Roosevelt. "CERCLA's legislative history reflects a decidedly domestic focus." *ARC Ecology v. U.S. Dept. of the Air Force*, 294 F.Supp.2d at 1156. CERCLA provides a mecha-

nism for cleaning up hazardous waste sites and imposes the cost of clean-up on those responsible for the contamination. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7, 109 S.Ct. 2273 (1989). "CERCLA . . . addresses the cleanup of hazardous substances released into the environment . . . ." *Westfarm Assoc. Ltd. P'ship v. Int'l Fabricare*, 846 F.Supp. 422, 434 (D.Md. 1993).

The Upper Columbia River Site, including Lake Roosevelt, is entirely within the United States. "The Site will include all areas in the United States where hazardous substances from Respondent's Trail operations have migrated or materials containing hazardous substances have come to be placed." (UAO at pp. 7-8). CERCLA is concerned with the "release" of hazardous substances into the Upper Columbia River Site. According to the UAO at pp. 5-6: "The presence of hazardous substances at the Site or the past, present, or potential migration of hazardous substances currently located at or emanating from the Site, constitute actual and or threatened 'releases.'" Under CERCLA, a "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . . " 42 U.S.C. § 9601(22). CERCLA's definition of "environment" is limited to waters, land, and air under the management authority of the United States, within the United States, or under the jurisdiction of the United States. 42 U.S.C. § 9601(8).

It is of course true, however, that these "releases" in the United States would not exist without the activity at the smelter located in British Columbia, prompting defendant to argue that what plaintiffs effectively seek to do here with CERCLA is regulate the discharge of hazardous substances from the Trail smelter. To find there is not an extraterritorial application of CERCLA in this case would require reliance on a legal fiction that the "releases" of hazardous substances into the Upper Columbia River Site and Lake Roosevelt are wholly separable from the discharge of those substances into

the Columbia River at the Trail smelter. The court is hesitant to do that and therefore, will assume this case involves an extraterritorial application of CERCLA to conduct occurring outside U.S. borders. In doing so, however, the court does not find that said application is an attempt to regulate the discharges at the Trail smelter, but rather simply to deal with the effects thereof in the United States.

Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227 (1991) ("*Aramco*"). It is, however, a longstanding principle of American law "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Id.*, quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575 (1949). This "canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained." *Id.*, quoting *Foley Bros.*, 336 U.S. at 285. "It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.*

In applying this canon of construction, courts look to see whether "language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond **places** over which the United States has sovereignty or has some measure of legislative control." *Id.*, quoting *Foley Bros.*, 336 U.S. at 285 (emphasis added). It is assumed Congress legislates "against the backdrop of the presumption against extraterritoriality." *Id.* Unless the affirmative intention of Congress is clearly expressed, it must be presumed Congress "is primarily concerned with **domestic conditions**." *Id.*, quoting *Foley Bros.*, 336 U.S. at 285 (emphasis added).

In *Aramco*, the Supreme Court held Title VII of the 1964 Civil Rights Act did not apply extraterritorially to regulate

the employment practices of U.S. firms that employ American citizens abroad. 499 U.S. at 259. The discriminatory conduct that allegedly violated Title VII occurred within the jurisdiction of another sovereign (Saudi Arabia), although perpetrated by a U.S. firm. Since the petitioners advanced a construction of Title VII that would have logically resulted in the statute's application to foreign as well as American employers, the Supreme Court held the presumption against extraterritoriality was necessary to avoid the inevitable clash between foreign and domestic employment laws. *Id.* at 255-56.

"Extraterritoriality is essentially, and in common sense, a jurisdictional concept concerning the authority of a nation to adjudicate the rights of particular parties and to establish the norms of conduct applicable to events or persons outside its borders." *Environmental Defense Fund v. Massey*, 986 F.2d 528, 530 (D.C. Cir. 1993). The extraterritoriality principle provides that "[r]ules of the United States statutory law, whether prescribed by federal or state authority, apply only to **conduct occurring within, or having effect within, the territory of the United States**." *Id.*, quoting *Restatement (Second) of Foreign Relations Law of the United States* § 38 (1965), and *Restatement (Third) of Foreign Relations Law of the United States* § 403, Com. (g) (1987). (Emphasis added).

In *Massey*, the D.C. Circuit discussed those situations when the presumption against extraterritorial application of a statute does not apply. According to the court, the Supreme Court's decision in *Aramco* made explicit that the presumption does not apply where there is an "'affirmative intention of the Congress clearly expressed' to extend the scope of the statute to conduct occurring within other sovereign nations." 986 F.2d at 531. Second, "the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." *Id.* The court noted that two prime examples of this exception are the Sherman Anti-Trust Act, 15 U.S.C.

§§ 1-7 (1976), and the Lanham Trade-Mark Act, 15 U.S.C. § 1051 et seq. (1976), which "have both been applied extraterritorially where the failure to extend the statute's reach would have negative economic consequences within the United States." *Id.* The presumption against extraterritoriality also does not apply when the conduct regulated by the government occurs within the United States. *Id.*[3] "By definition, an extraterritorial application of a statute involves the regulation of conduct beyond U.S. borders." *Id.*

In *Massey*, the D.C. Circuit concluded there was no issue of "extraterritoriality" regarding the application of the National Environmental Policy Act (NEPA) to agency actions in Antarctica. The court found that "since NEPA is designed to regulate conduct occurring within the territory of the United States, and imposes no substantive requirements which could be interpreted to govern conduct abroad, the presumption against extraterritoriality" did not apply. 986 F.2d at 533. Antarctica's unique status in the international arena as a "global commons" rather than a sovereign foreign nation supported the circuit's conclusion. The court noted that where the U.S. "has some real measure of legislative control over the region at issue, the presumption against extraterritoriality is much weaker." *Id.* And where there is no potential for conflict between U.S. laws and the laws of other nations, the purpose behind the presumption is eviscerated, and the presumption against extraterritoriality applies with significantly less force. *Id.* According to *Massey*:

> Applying the presumption against extraterritoriality here would result in a federal agency being allowed to undertake actions significantly affecting the human environment in

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[3] These "conduct" and "effects" tests are fundamental principles of foreign relations law. *See Tamari v. Bache & Co.*, 730 F.2d 1103, 1107-08 and n.11 (7th Cir. 1984), citing *Restatement (Second) Foreign Relations Law* §§ 17 and 18 (1965).

> Antarctica, an area over which the United States has substantial interest and authority, without ever being held accountable for its failure to comply with the decisionmaking procedures instituted by Congress– even though such accountability, if it was enforced, would result in no conflict with foreign law or a threat to foreign policy. NSF [National Science Foundation] has provided no support for its proposition that conduct occurring within the United States is rendered exempt from otherwise applicable statutes merely because the effects of its compliance would be felt in the global commons.

Id. at 536-37.

Although defendant TCM takes a dim view of *Massey*, contending much what is says is mere dicta, the Ninth Circuit apparently does not share that view. In *In re Simon*, 153 F.3d 991, 995 (9th Cir. 1998), the Ninth Circuit noted that "[i]f Congressional intent concerning extraterritorial application cannot be divined, then courts will examine additional factors to determine whether the traditional presumption against extraterritorial application should be disregarded in a particular case."[4] First, "the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." *Id.*, quoting *Massey*, 986 F.2d at 531. Furthermore, the presumption against extraterritoriality is not applicable when the

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[4] Intent is analyzed by first examining the language of the act for indications of intent regarding extraterritorial application. In addition to the plain statutory words, intent may be discerned with reference to similarly phrased legislation or the overall statutory scheme. If these inquiries are inconclusive, examination of legislative history is appropriate. Resort to administrative interpretations of the law may be employed if the legislative history is inconclusive. *Simon*, 153 F.3d at 995, citing *Aramco*, 499 U.S. at 248, 250-51, and *Foley Bros.*, 336 U.S. at 286-88.

regulated conduct "is intended to and results in, substantial effects within the United States." *Id.*, quoting *Laker Airways, Ltd., v. Sabena Belgian World Airlines*, 731 F.2d 909, 925 (D.C. Cir. 1984). In *Simon*, the Ninth Circuit found the district court had properly concluded that as to actions against a bankruptcy estate, Congress had clearly intended extraterritorial application of the Bankruptcy Code. *Id.* at 996.

In *Subafilms v. MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994), the Ninth Circuit considered whether a claim for infringement can be brought under the Copyright Act when the assertedly infringing conduct consists solely of the authorization within the territorial boundaries of the United States of acts that occur entirely abroad. The circuit held that such allegations did not state a claim for relief under the copyright laws of the United States.

The plaintiffs in *Subafilms* contended the copyright laws extended to extraterritorial acts of infringement when such acts result in adverse effects within the United States. The circuit disagreed. It noted there was an "undisputed axiom" that the copyright laws of the United States had no application to extraterritorial infringement, that said axiom predated the 1909 Copyright Act, that this principle of territoriality had been consistently reaffirmed, and that there was no clear expression of congressional intent in either the 1976 Copyright Act or other relevant enactments to alter the preexisting extraterritoriality doctrine. *Id.* at 1095-96. Furthermore, in 1976, Congress chose to expand one specific extraterritorial application of the Act by declaring that the unauthorized importation of copyrighted works constitutes infringement even when the copies lawfully were made abroad. Thus, "[h]ad Congress been inclined to overturn the preexisting doctrine that infringing acts that take place wholly outside the United States are not actionable under the Copyright Act, it knew how to do so." *Id.* at 1096. Accordingly, the presumption against extraterritoriality was fortified by the language of the

statute as set against its consistent historical interpretation. *Id.* Obviously, because the case at bar presents a legal issue of first impression, there is not an "undisputed axiom," consistently reaffirmed by the courts, that CERCLA does not apply to extraterritorial conduct.

The *Subafilms* court discussed the fact that the "presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in [adverse] domestic effects." *Id.*, quoting *Massey*, 986 F.2d at 531. The Ninth Circuit observed that "[i]n each of the statutory schemes discussed by the *Massey* court, the ultimate touchstone of extraterritoriality consisted of an ascertainment of congressional intent; courts did not rest solely on the consequences of a failure to give a statutory scheme extraterritorial application." *Id.* And the circuit further observed that even "[m]ore importantly, as the *Massey* court conceded, . . . application of the presumption is particularly appropriate when 'it serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* at 1096-97, quoting *Aramco*, 499 U.S. at 248. In a footnote, however, the circuit also conceded that this was not the sole source of the presumption against extraterritorial application because the presumption "is rooted in a number of considerations, not the least of which is the common-sense notion the Congress generally legislates with **domestic concerns** in mind." *Id.* At 1097, n.13, quoting *Smith v. United States*, 507 U.S. 197, 113 S.Ct. 1178, 1183 n. 5 (1993) (emphasis added).

In *Subafilms*, the circuit found the "international discord" factor decisive in the case of the Copyright Act, fully justifying application of the presumption against extraterritoriality, even assuming *arguendo* that "adverse effects" within the United States "generally" would require a plenary inquiry into Congressional intent. *Id.* at 1097. According to the circuit:

> [B]ecause an extension of the extraterritorial reach of the Copyright Act by the courts would in all likelihood disrupt the international regime for protecting intellectual property that Congress so recently described as essential to furthering the goal of protecting the works of American authors abroad . . . we conclude that the *Aramco* presumption must be applied.

Id. at 1098.

Here, defendant TCM contends the presumption against extraterritorial application is not defeated because CERCLA is "bare of any language affirmatively evidencing any intent to reach foreign sources." There is no dispute that CERCLA, its provisions and its "sparse" legislative history, do not clearly mention the liability of individuals and corporations located in foreign sovereign nations for contamination they cause within the U.S. At the same time, however, there is no doubt that CERCLA affirmatively expresses a clear intent by Congress to remedy "domestic conditions" within the territorial jurisdiction of the U.S. That clear intent, combined with the well-established principle that the presumption is not applied where failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States, leads this court to conclude that extraterritorial application of CERCLA is appropriate in this case.[5]

Under CERCLA, a "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body. 42 U.S.C. § 9601(21). Defendant notes

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[5] This case is distinguishable from the situations in *Aramco* and *Asplundh Tree Expert Company v. National Labor Relations Board*, 365 F.3d 168 (3d Cir. 2004), involving American employees working and physically located in foreign lands (Saudi Arabia and Canada).

that "State" is expressly defined to include the "several States of the United States" and other possessions or territories of the United States, § 9601(27), and that "Indian tribe" is defined as a tribe recognized by the United States, § 9601(36). Plaintiffs, however, are not seeking to enforce the UAO against the Canadian government. They are attempting to enforce it against a "corporation," albeit a Canadian corporation. "Corporation" is defined generically. There is no language which excludes foreign corporations from the definition.[6]

42 U.S.C. § 9607(a) lists the categories of persons who can be liable under CERCLA for response costs and damages. They include: (1) "the owner and operator of a vessel or a facility;" (2) "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;" (3) "any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances;" and (4) "any person who accepts or accepted any hazardous substance for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release which causes the incurrence of response costs, of a hazardous substance."

The "Conclusions Of Law And Determinations" section of the UAO (at p. 5) says the "Upper Columbia River Site is a 'facility' as defined in Section 101(9) of CERCLA, 42 U.S.C. § 6901(9)." The definition of "facility" under that section includes "(B) any site or area where a hazardous sub-

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[6] There is no question that a Canadian corporation can be held liable under CERCLA for conduct occurring in the United States. See *United States v. Ivey*, 747 F.Supp. 1235 (E.D. Mich. 1990).

stance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . ." Because the "Upper Columbia River Site" is the "facility" in this case, that would appear to rule out 42 U.S.C. § 9607(a)(1) or (2) as a basis for defendant's potential liability under CERCLA. Clearly, the defendant is not the "owner and/or operator" of the Upper Columbia River Site. Furthermore, no one argues that defendant has "transporter" liability under § 9607(a)(4). That leaves "generator" or "arranger" liability under § 9607(a)(3) with defendant being "any person who . . . otherwise arranged for disposal . . . of hazardous substances owned or possessed by such person . . . at any facility [the Upper Columbia River Site including Lake Roosevelt] owned or operated by another party or entity [the United States] and containing such hazardous substances."[7]

Defendant points out that the UAO does not specifically cite § 9607(a)(3) as the basis for defendant's potential liability under CERCLA. This is not surprising, however, since the UAO was issued pursuant to § 9606(a).[8] This is an "abatement action" which directs defendant to conduct a "Remedial Investigation/Feasibility Study" regarding the Upper Columbia River Site. The UAO reserves EPA's right

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7 "To accord CERCLA's liability provisions any meaning at all, the language 'containing such hazardous substances found in Section [9607(a)(3)] must be construed as referring to facilities that have been, by a depositor's actions, contaminated by waste." *State of New York v. General Elec. Co.*, 592 F.Supp. 291, 296 n. 9 (N.D.N.Y. 1984).

8 § 9606(b)(1) provides:

> Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

Of course, this is precisely what plaintiffs are attempting to do in this case.

to bring an action against defendant under § 9607 for recovery of any response costs incurred by the United States related to the Site and not reimbursed by the defendant. (UAO at p. 18).[9] If defendant were to comply with the UAO, it could seek reimbursement from the United States for doing so, provided it established by a preponderance of the evidence that it was not liable for response costs under § 9607(a). See 42 U.S.C. § 9606(b)(2)(A) and (C). § 9606(b)(2)(A) refers to "any person." As noted, the definition of "person" in §9601(21) does not distinguish between domestic and foreign corporations or individuals.

Defendant asserts it could not be an "arranger" because it did not "otherwise arrange" for disposal of hazardous substances "**by any other party or entity**, at any facility . . . owned or operated by another party or entity and containing such hazardous substances . . . ." (Emphasis added). The "plain language" of § 9607(a)(3) would appear to require another party, other than just the defendant, be involved in the disposal of the hazardous substances.[10] Defendant, however, does not cite a single case or any legislative history that has held that the involvement of another party or entity in the disposal is required for there to be "generator" or "arranger" liability. Indeed, defendant acknowledges that case law has declared the definition of "arranger" in CERCLA to be "inartful." *U.S. v. Iron Mountain Mine, Inc.*, 881 F.Supp. 1432, 1451 (E.D. Cal. 1995). "Arranger" is undefined in CERCLA.[11]

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9 The individual plaintiffs could also seek response costs under the "citizen suit" provision at 42 U.S.C. Section 9659(a).

10 Another party will be involved when there is a "contract" or an "agreement" for disposal. There is, however, the catch-all phrase "otherwise arranged for disposal."

11 "Congress did not, to say the least, leave the floodlights on to illuminate the trail to the intended meaning of arranger status and liability." *United States v. New Castle County*, 727 F.Supp. 854, 871 (D. Del. 1989). Legislative history "sheds little light" on the intended meaning of

There is authority supporting the proposition that a third-party is not required for "arranger" liability. In *State of Colorado v. Idarado Mining Co.*, 707 F.Supp. 1227 (D. Colo. 1989) , the defendants were held liable because they "otherwise arranged . . . for disposal" of hazardous waste by placing their contaminated tailings in the San Miguel River and those tailings "[had] come to be located" at the Society Turn area. *Id.* at 1241. In *National Railroad Passenger Corp. v. New York Housing Authority*, 819 F.Supp. 1271, 1277 (S.D.N.Y. 1993), the court found there was "arranger" liability where asbestos-containing material was flaking from the defendant's buildings onto the railroad tracks located below.

Courts have construed "generator" and "arranger" liability expansively. Thus, in *EPA v. TMG Enterprises*, 979 F.Supp. 1110, 1122-23 (W.D. Ky. 1997), the court stated:

> Although the phrase 'arranged for' is not defined in the statute and CERCLA's legislative history sheds scant light on its intended meaning, courts have concluded that a liberal judicial interpretation is consistent with CERCLA's 'overwhelmingly remedial' statutory scheme. [Citation omitted]. Furthermore, courts consistently have construed this phrase so as to promote CERCLA's dual goals: to allow the government to respond promptly and effectively to problems resulting from hazardous waste disposal and to allow recovery of clean-up costs from those responsible for creating the problem.

To that end, "[i]n the absence of a contract or agreement, the court must look to the totality of the circumstances, including any 'affirmative acts to dispose' to determine

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[Footnote continued from previous page]
the phrase. *United States v. Aceto Agr. Chemicals Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989).

whether a transaction involved an arrangement for disposal." *Id.* at 1123. A defendant cannot escape generator liability simply because it does not choose the ultimate destination of its waste. *Acme Printing Ink Co. v. Menard*, 881 F.Supp. 1237, 1250 (E.D. Wis. 1995). Furthermore, arranger liability "may attach even though the defendant did not know the substances would be deposited at a particular site or in fact believed they would be deposited elsewhere." *Pierson Sand & Gravel Inc. v. Pierson Township*, 851 F.Supp. 850, 855 (W.D. Mich. 1994). "[C]ontrol is not a necessary factor in every arranger case [and] [t]he Court must consider the totality of the circumstances . . . to determine whether the facts fit within CERCLA's remedial scheme." *Coeur d'Alene Tribe v. Asarco, Inc.*, 280 F.Supp.2d 1094, 1131 (D. Idaho 2003). Congress did not limit the definition of "disposal" to the initial introduction of hazardous material into the environment. *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1342 (9th Cir. 1992). Based on these authorities, "generator" and/or "arranger" liability under CERCLA cannot be ruled out for defendant. That, however, is, not a finding this court needs to make at this time and which can be litigated, if necessary, at a later date.

Defendant contends that if plaintiffs' "arranger" interpretation is extended to foreign corporations, it would produce the "absurd" result that the same conduct by the same corporation would, while not resulting in liability to that corporation as an "owner or operator," result in liability as an "arranger" and no coverage for that corporation under the "federally permitted release" provision of CERCLA at 42 U.S.C. § 9607(j). The court is not persuaded that the language of CERCLA or its legislative history is conclusive that a foreign corporation cannot be liable as an owner and/or operator under either § 9607(a)(1) and /or § 9607(a)(2). Nor is the court persuaded that the lack of coverage under § 9607(j) for a foreign corporation manifests congressional intent that

CERCLA was not intended to apply to foreign corporations whose conduct has adverse effects within the United States.

§ 9607(a)(1) refers to "the owner and operator of a vessel or a facility." The term "owner or operator" means "in the case of an onshore facility or an offshore facility, any person owning or operating such facility." § 9601(20)(A). "Offshore facility" means "any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a pubic vessel." § 9601(17). "Onshore facility" means "any facility of any kind located in, on, or under, any land or non-navigable waters within the United States." § 9601(18). Although § 9607(a)(1), pertaining to current owners and operators, does not contain the "any person" language, § 9607(a)(2), pertaining to past owners or operators, contains that language and also refers to "any facility" ("any person who at the time of the disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of"). Defendant concedes the definition of "facility" at § 9601(9) includes no geographical limitation, but asserts its component terms "on-shore facility" and "offshore" facility "**appear** to exhaust the possibilities for that category" and are separately defined in the statute as being limited to facilities located in or subject to the jurisdiction of the United States" (emphasis added). One has to ask that if "on-shore facility" and "offshore facility" are the only possible "facilities" under § 9607(a)(1) and/or (2), why have a separate definition of "facility" at § 9601(9) which makes no reference to the definitions of "offshore facility" and "on-shore facility" found at §§ 9601(17) and (18) and instead broadly defines "facility" without geographical limitation?

Even assuming Congress intended a geographic limitation on "facility" for current owner/operator liability under § 9607(a)(1) and perhaps also for past owner/operator liabil-

ity under § 9607(a)(2), while not for "arranger" liability under § 9607(a)(3), the court is not convinced that is an "absurd" result considering CERCLA is concerned with "domestic conditions" in the United States.[12] The case at bar is a prime example. What plaintiffs seek to remedy by way of the UAO is not what is happening right now and what has happened in the past at defendant's "facility" in Canada with regard to the disposal of hazardous substances into the Columbia River at that location. What plaintiffs seek to remedy is the result of that practice which has manifested itself at a "facility" within the territorial boundaries of the United States. Certainly, it is true this remedy may have the incidental effect of altering defendant's future disposal practices at its "facility" in Trail, B.C., but that does not change the essential fact that what plaintiffs are attempting to do is remedy an existing condition at a "facility" (the Upper Columbia River Site) wholly within the U.S. In other words, plaintiffs are not attempting to tell Canada how to regulate defendant's disposal of hazardous substances into the Columbia River, simply that they expect defendant to assist in cleaning up a mess in the United States which has allegedly been caused by those substances. Plaintiffs' use of CERCLA is not intended to supersede Canadian environmental regulation of the defendant. Canada's environmental laws are intended to protect Canadian territory, including the 10 miles from Trail, B.C. to the U.S. border. Those laws do nothing to remedy the damage that has already occurred in U.S. territory as a result of defendant's disposal of hazardous substances into the Columbia River.

Plaintiffs assert Congress' intent that foreign polluters of U.S. territory be held liable under CERCLA is apparent from legislative history of amendments made to the definition of liable parties. Plaintiffs note that as originally enacted, CER-

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12 This is quite a large assumption considering CERCLA's language and sparse legislative history.

CLA provided that the owner and operator of a vessel was liable under CERCLA only if "otherwise subject to the jurisdiction of the United States," but that the Superfund Amendments and Reauthorization Act of 1986 ("SARA") deleted the language "otherwise subject to the jurisdiction of the United States.," "making it clear that liability under CERCLA applies to releases from foreign vessels." *A&P H.R. Conf. Rep.* 99-962 (Oct. 3, 1986). "[F]oreign flag vessels not otherwise under United States jurisdiction are subject to liability under section 107 of CERCLA." *A&P House. Rep.* 99-253(I) (August 1, 1985). Defendant notes, however, that the amendment simply clarified that "foreign vessels not otherwise under United States jurisdiction **that release hazardous substances in areas subject to United States jurisdiction** are subject to liability under section 107 of CERCLA." *SARA Leg. History 32, Section by Section Analysis at 72 (House Energy and Commerce Committee Report,* 99-253, Part I) (emphasis added). According to defendant, the amendment made it clear that a foreign ship in U.S. waters could be held liable under CERCLA for a spill which "is no different than the liability finding for the Canadian owner of a Michigan waste site."

Defendant, however, cites no legislative history indicating Congress specifically limited liability to foreign vessels in U.S. waters that spill hazardous substances in those waters, as opposed to foreign vessels located outside U.S. waters who spill hazardous substances which eventually make their way into U.S. waters. The language quoted above ("foreign vessels not otherwise under United States jurisdiction that release hazardous substances in areas subject to United States jurisdiction") could just as logically refer to a foreign vessel outside U.S. waters that releases hazardous substances which eventually make their way into "areas (waters) subject to United States jurisdiction." That is no different than the situation here with a facility located on Canadian soil dumping hazardous substances into the Columbia River

which eventually make their way downstream into an area (the "Upper Columbia River Site") subject to United States jurisdiction.

42 U.S.C. § 9607(j), the "federally permitted release" provision, addresses a situation where the release of contaminants is the subject of regulation under another federal statute (i.e., the Clean Air Act, the Clean Water Act, etc.) and provides that if a facility is operating in compliance with its permit, recovery of response costs or damages, if any, with respect to such releases will be dealt with under existing law (the permit regime rather than CERCLA). § 9607(j) states: "Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section."

Defendant notes that its Trail smelter is not and could not be regulated under U.S. statutes (such as the Clean Air Act, the Clean Water Act, etc.) and therefore, would not be able to obtain an EPA permit for discharges to the Columbia River. Instead, the Trail smelter is regulated by Canadian environmental agencies under permits issued by Canadian statutes, and CERCLA does not provide for recognition of the regulatory regime governing the operation of the smelter or any other regulatory regime adopted by a foreign country. Thus, defendant asserts that under CERCLA, a U.S. facility discharging metal-bearing waste into a river in the U.S. in compliance with its Clean Water Act permit "could avoid any CERCLA liability," while a facility in Canada or Mexico, "even if operating under the same or more stringent permit standards, would continue to be subject to CERCLA joint and several liability for the whole cleanup if even a small amount of its discharges should reach the same river in the United States." According to defendant, "the vast net of CERCLA liability would supplant the source country's regulation of its industrial and municipal waste, wherever and

however, such waste reached or threatened to reach the U.S. side of the United States/Canada border."

Plaintiffs observe that having a "federally permitted release," while a defense to an action for response costs and damages, is not a defense to a CERCLA clean-up order such as in the case at bar. With regard to liability for response costs and damages under CERCLA, there may indeed be circumstances where there is unequal treatment of a facility in the U.S. discharging waste into the river versus a facility located in Canada discharging waste in the river which happens to make its way to the U.S.[13] There is not, however, unequal treatment as a general matter because even if the U.S. facility with the "federally permitted release" is not subject to CERCLA liability, it still is potentially liable under another statute such as the Clean Air Act or the Clean Water Act. As defendant admits, 42 U.S.C. § 9607(j) is not a "free pass to pollute." The facility located in Canada is rightly subject to liability under CERCLA to clean up contamination it has caused within the United States because Canada's own laws and regulations will not compel the Canadian facility to clean up the mess in the United States which it has created. As plaintiffs aptly put it: "EPA is not, through issuance of the UAO, attempting to control [defendant's] ongoing operations, or address any hazardous substances attributable to its operations which may be found in Canadian soil, water, air or sediment." Furthermore, "[a]ny Canadian discharge permit issued to [defendant] for its Trail operations necessarily considers only the impact on the approximately ten miles of river between [defendant's] facility and the Canadian border, and not the impacts on territory located in the US, where the impacts of [defendant's] past releases [are] most significant."

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[13] As the amici point out, there would not be unequal treatment with regard to hazardous waste deposited before the existence of the permit regime. Plaintiffs allege defendants' discharge of hazardous waste since 1906 has resulted in the contamination of the Upper Columbia River Site.

Defendant asserts that CERCLA treats foreign claimants to the Superfund less favorably than domestic claimants and therefore, this evidences that Congress did not intend extra-territorial application of CERCLA. As noted above, 42 U.S.C. § 9606(b)(2)(A) provides that "any person" who complies with an order issued under § 9606(a) may petition for reimbursement from the Superfund for the reasonable costs of such action, plus interest.[14] The definition of "person" in CERCLA (§ 9601(21)) does not distinguish between foreign and domestic individuals or corporations.

Defendant submits that foreign claimants are limited to submitting their claims pursuant to 42 U.S.C. § 9611(l), but the court is not persuaded. § 9611(l) provides:

> To the extent that the provisions of this chapter permit, a foreign claimant may assert a claim to the same extent that a United States claimant may assert a claim if--
>
> (1) the release of a hazardous substance occurred (A) in the navigable waters or (B) in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident;
>
> (2) the claimant is not otherwise compensated for his loss;
>
> (3) the hazardous substance was released from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under the Outer Continental Shelf Lands Act, as amended . . . or the Deepwater Port Act of 1974, as amended . . . ; and

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[14] If the petition is not granted, the "person" can sue the President in the appropriate United States district court seeking reimbursement from the Superfund. 42 U.S.C. § 9606(b)(2)(B).

> (4) recovery is authorized by a treaty or an executive agreement between the United States and foreign country involved, or if the Secretary of State, in consultation with the Attorney General and other appropriate officials certifies that such country provides a comparable remedy for United States claimants.

§ 9611(l) pertains to a different situation than under § 9606(b)(2). § 9611(l) provides a mechanism for foreign claimants, who are not in any way "responsible" for a release of hazardous substances, to seek reimbursement from the Superfund for costs incurred in responding to the release of such substances in the navigable waters or in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident, where the release was from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under U.S. law (the Outer Continental Shelf Lands Act or the Deepwater Port Act). § 9611(l) pertains to releases outside the U.S. as opposed to releases within the U.S. which, of course, is the situation in the case at bar. *See ARC Ecology*, 294 F.Supp.2d at 1158.

Defendant observes that CERCLA's "citizen suit" provision did not require the individual plaintiffs to give notice to Canada or British Columbia of intent to sue, although it did require them to give such notice to the United States and the State of Washington. 42 U.S.C. § 9659(d)(1). Furthermore, pursuant to § 9659(g), only the United States or the State, if not a party, may intervene as a matter of right in a "citizen suit."[15] The court does not consider that significant in deter-

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15 "United States" and "State" include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction. 42 U.S.C. § 9601(27).

mining whether Congress intended extraterritorial application of CERCLA. There is no dispute that Canada and British Columbia have been made aware of the subject UAO and this subsequent litigation, presumably because defendant told them of these matters. While CERCLA does not allow British Columbia or Canada to intervene as a matter of right, they could seek permissive intervention. CERCLA's limiting intervention as a matter of right to the United States and the States makes sense because the contamination at issue is within the United States and the State of Washington.

There is no direct evidence that Congress intended extraterritorial application of CERCLA to conduct occurring outside the United States. There is also no direct evidence that Congress did not intend such application. There is, however, no doubt that Congress intended CERCLA to clean up hazardous substances at sites within the jurisdiction of the United States. That fact, combined with the well-established principle that the presumption against extraterritorial application generally does not apply where conduct in a foreign country produces adverse effects within the United States, leads the court to conclude that extraterritorial application of CERCLA is not precluded in this case. The Upper Columbia River Site is a "domestic condition" over which the United States has sovereignty and legislative control. Extraterritorial application of CERCLA in this case does not create a conflict between U.S. laws and Canadian laws.

In *Tamari v. Bache & Co.*, cited *supra* at fn. 3, the Seventh Circuit found nothing in the Commodities Exchange Act (CEA) or its legislative history to indicate Congress did not intend the CEA to apply to foreign agents, but recognizing there also was no direct evidence that Congress intended such application, relied on the "conduct" and "effects" tests in discerning whether it had subject matter jurisdiction over the dispute. The court concluded it did have jurisdiction over causes of action arising from trading on U.S. exchanges, even though the parties were nonresident aliens (Lebanese) and the

contacts between them occurred in a foreign country (Lebanon). Said the court:

> The transmission of commodity future orders to the United States would be an essential step in the consummation of any scheme to defraud through futures trading on United States exchanges. Further, when transactions initiated by agents abroad involve trading on United States exchanges, the pricing and hedging functions of the domestic markets are directly implicated, just as they would be by an entirely domestic transaction. If transactions are the result of fraudulent representations, unauthorized trading or mismanagement of trading accounts, prices and trading volumes in the domestic marketplace will be artificially influenced, and public confidence in the markets could be undermined.
>
> By asserting jurisdiction under the conduct and effects rationales, the purposes of the Act are advanced. Were we to construe the CEA as inapplicable to the foreign agents of commodity exchange members when they facilitate trading on domestic exchanges, the domestic commodity futures market would not be protected from the negative effects of fraudulent transactions originating abroad. Because the fundamental purpose of the Act is to ensure the integrity of the domestic commodity markets, we expect that Congress intended to proscribe fraudulent conduct associated with any commodity future transactions executed on a domestic exchange, regardless of the location of the agents that facilitate the trading.

730 F.2d at 1108.

The same rationale applies here. Because the fundamental purpose of CERCLA is to ensure the integrity of the domestic environment, we expect that Congress intended to proscribe conduct associated with the degradation of the environment, regardless of the location of the agents responsible for said conduct.

III. CONCLUSION

The court has subject matter jurisdiction under CERCLA. The court has personal jurisdiction over the defendant and the exercise of said jurisdiction is reasonable. Plaintiffs' complaints state claims under CERCLA upon which relief can be granted. Therefore, defendant's Motion To Dismiss (Ct. Rec. 6) is **DENIED.**

THE COURT CERTIFIES THIS MATTER FOR AN IMMEDIATE APPEAL TO THE NINTH CIRCUIT COURT OF APPEALS ON THE BASIS THAT THE ORDER ISSUED BY THIS COURT "INVOLVES A CONTROLLING QUESTION OF LAW AS TO WHICH THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION AND THAT AN IMMEDIATE APPEAL FROM THE ORDER MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION." 28 U.S.C. §1292(b).

IT IS SO ORDERED. The District Executive is directed to enter this order and forward copies to counsel.

DATED this 8th of November, 2004.

s/ Alan A. McDonald
ALAN A. McDONALD
Senior United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; STATE OF WASHINGTON, Plaintiffs – Appellees, v. TECK COMINCO METALS, LTD., A Canadian corporation, Defendant - Appellant.	No. 05-35153 D.C. No. CV-04-00256-AAM Eastern District of Washington, Spokane ORDER

Before: GOULD and BERZON, Circuit Judges, and SCHWARZER,* District Judge.

The Petition for Rehearing is DENIED.

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.

APPENDIX D

42 U.S.C. § 9601. Definitions

For purpose of this subchapter—

. . .

(8) The term "environment" means

(A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. 1801 et seq.], and

(B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

(9) The term "facility" means

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or

(B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

. . .

(22) The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the envi-

ronment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) . . . .

42 U.S.C. § 9606. Abatement actions

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b) Fines; reimbursement

(1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

(2)

(A) Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President

for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607 (a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 9607 (a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate

costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of title 28.

42 U.S.C. § 9607. Liability

(a) Covered persons . . .

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604 (i) of this title. . . .

42 U.S.C. § 9613. Civil proceedings

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607 (a) of this title, during or following any civil action under section 9606 of this title or under section 9607 (a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9659. Citizens suits

(a) Authority to bring civil actions

Except as provided in subsections (d) and (e) of this section and in section 9613 (h) of this title (relating to timing of judicial review), any person may commence a civil action on his own behalf—

(1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any

standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter (including any provision of an agreement under section 9620 of this title, relating to Federal facilities); or

(2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter, including an act or duty under section 9620 of this title (relating to Federal facilities), which is not discretionary with the President or such other officer.

Paragraph (2) shall not apply to any act or duty under the provisions of section 9660 of this title (relating to research, development, and demonstration).

APPENDIX E

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10

IN THE MATTER OF: UPPER COLUMBIA RIVER SITE	UNILATERAL ADMINISTRATIVE ORDER FOR REMEDIAL INVESTIGATION/FEASIBILITY STUDY
Teck Cominco Metals, Ltd.,	U.S. EPA Region 10 CERCLA Docket No. CERCLA-10-2004-0018
Respondent	Proceeding Under Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §9606(a)

I. INTRODUCTION AND JURISDICTION

1. This Administrative Order ("Order") is being issued by the U.S. Environmental Protection Agency to Teck Cominco Metals, Ltd. (hereinafter "Teck Cominco" or "Respondent"). The Order concerns the preparation and performance of a Remedial Investigation/Feasibility Study ("RI/FS") as described in the attached Statement of Work

("SOW") (Attachment 1) at the Upper Columbia River Site (the "Site") in eastern Washington.

2. This Order is issued pursuant to the authority vested in the President of the United States by Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9606(a) as amended ("CERCLA"), and delegated to the Administrator of the United States Environmental Protection Agency ("EPA") by Executive Order No. 12580, January 23, 1987, 52 Fed. Reg. 2923, as amended by Executive Order No. 13016, August 30, 1996, 61 Fed. Reg. 45871, further delegated to the Regional Administrators by EPA Delegation Nos. 14-14-A and 14-14-B and further redelegated to the Director, Office of Environmental Cleanup by Regional Delegations dated February 1, 2002, and October 5, 1998, respectively.

3. In issuing this Order, the objectives of EPA are: (a) to determine the nature and extent of contamination and the threat to the public health or welfare or the environment caused by the release or threatened release of hazardous substances, pollutants or contaminants at or from the Site; and (b) to determine and evaluate alternatives for remedial action to prevent, mitigate or otherwise respond to or remedy any release or threatened release of hazardous substances, pollutants or contaminants at or from the Site.

4. The activities conducted under this Order are subject to approval by EPA. The activities under this Order shall be conducted in accordance with all applicable EPA guidances, policies, and procedures.

II. FINDINGS OF FACT

1. For purposes of this Order, the Upper Columbia River Site consists of the areal extent of contamination in the United States associated with the Upper Columbia River, and all suitable areas in proximity to the contamination necessary for implementation of response action. The Upper Columbia River is the principal inflow, contributing about 90% of the

flow from a large drainage area in Canada and the United States to Franklin D. Roosevelt Lake (Lake Roosevelt), the reservoir behind Grand Coulee Dam. Approximately 15 river miles south of the U.S.-Canada border, the river becomes characteristic of a lake/reservoir due to the Grand Coulee Dam.

2. The reservoir was developed into a major recreational and economic resource for the surrounding area attracting more than one million visitors per year. Recreational use of the area has been extensive including activities such as fishing, swimming, camping, and boating. The Upper Columbia River and surrounding area is also habitat to wildlife, plants, a varied fish community, and other aquatic species, including species protected under the Endangered Species Act (ESA).

3. The Confederated Tribes of the Colville Indian Reservation (Colville Tribes) and the Spokane Tribe of Indians (Spokane Tribe) own reservation lands along the Upper Columbia River. The Colville Tribes and the Spokane Tribe have treaty-reserved rights and resources, and/or other rights, interests, or resources in the Site. The Colville Tribes petitioned EPA in August 1999, pursuant to Section 105 of CERCLA 42 U.S.C. § 9605, to conduct an assessment of hazardous substance contamination along the Columbia River extending approximately 150 river miles from the U.S.-Canada border to the Grand Coulee Dam.

4. EPA began conducting the site assessment in October 1999. EPA selected a Site Assessment Area from approximately river mile 745 near the U.S.-Canada border to river mile 675. This area is called the Upper Columbia River Site Assessment Area (Assessment Area). In conducting the site assessment, EPA found contaminants at the Upper Columbia River Site including, but not limited to, heavy metals such as arsenic, cadmium, copper, lead, mercury and zinc. EPA did not conduct an analysis for dioxin and furan in the Assessment Area, though these contaminants remain a concern.

EPA also observed the presence of slag, a by-product of the smelting furnaces, containing glassy ferrous granules and other metals, at beaches and other depositional areas at the Assessment Area.

5. The Site has been the subject of numerous studies by various governmental entities. Sources identified in these studies include releases from mining and milling operations, fertilizer production, smelting operations, pulp and paper production, sewage treatment plants, and other industrial activities.

6. Contaminants found at the Site are known to be toxic to humans and aquatic life. Routes of human exposure to slag and contaminated sediment include direct contact with slag on the beaches of the Upper Columbia River, contact with contaminated sediment during low draw down periods, inhalation of airborne particles, dermal contact, and ingestion. There is also a concern of human exposure from ingestion of lake/river water contaminated as a result of contact with slag or contaminated sediments. Consumption of fish, aquatic resources, native plants, and agricultural crops are also potential routes of human exposure.

7. Potential environmental effects of slag discharged to the Upper Columbia River include both chemical (increased metal loads, potential bioaccumulation, toxicity problems in biota) and physical (scouring of plants and animals from river substrates, severe erosion of fish gills, smothering of habitat) components. Some benthic organisms can accumulate toxins that are attached to sediment particles that the benthic organism ingests. Toxins accumulated in benthic organisms can be transferred up the food chain to higher predators such as fish.

8. EPA completed its site assessment in March 2003. Pursuant to the Hazard Ranking System, published as a federal regulation on December 14, 1990 (55 Fed. Reg. 51532), the Site received a hazardous ranking score above 28.50,

making the Site eligible for listing on EPA's National Priorities List (NPL). Currently, the Site is being considered by EPA for possible inclusion on the NPL.

9. Respondent owns and operates an integrated smelting and refining complex in Trail, British Columbia (hereinafter referred to as the "Trail Smelter") situated approximately 10 river miles north of the U.S.-Canada border. Respondent has arranged for the disposal of its hazardous substances from the Trail Smelter into the Upper Columbia River by directly discharging up to 145,000 tonnes of slag annually prior to mid-1995. Effluent, such as slag, was discharged into the Columbia River through several outfalls at the Trail Smelter. The slag contains metals including, but not limited to, copper, lead, and zinc. The slag was carried downstream in the passing river current and settled in slower flowing quiescent areas. Effluent continues to be discharged from the Trail Smelter into the Columbia River.

10. The Trail Smelter facility also produces a variety of sulfur products and agricultural fertilizers which represent a potential source of mercury. Historically, the Trail Smelter discharged sulfur dioxide into the air increasing its discharge of sulfur dioxide from 4,700 tons a month to 10,000 tons a month in 1925. At that time, citizens of the town of Northport, Washington, situated just south of the U.S.-Canada border in the Columbia River valley, complained to local and state officials that pollution from the Trail smelter was threatening their health and environment.

11. After the Site scored above a 28.50 on the HRS, EPA began to evaluate proposing the Site on the NPL for the purpose of obtaining federal funding for evaluation and future cleanup of the Site. At this time, Teck Cominco American Inc. ("TCAI") approached EPA and the surrounding local county governments expressing a willingness to perform an independent, limited human health study at the Site if EPA would delay proposing the Site for NPL listing.

12. EPA expressed its interest in working with Teck Cominco, in coordination with the State, Tribes, and local governments, in delaying a listing by entering a Superfund Alternative Agreement with Teck Cominco, in accordance with EPA's guidance on Response Selection and Enforcement Approach for Superfund Alternative Sites, issued June 24, 2002 ("SAS guidance"). Under EPA's SAS guidance, EPA may enter settlements at sites that require long-term response and are eligible to be placed on the NPL, but are not yet listed, as long as EPA takes steps to ensure equivalency in the absence of an NPL listing. For example, it is critical to ensure that settlements covering these response actions achieve cleanup levels equivalent to those required at NPL sites, and that EPA, tribes, states and natural resource trustees are in an equivalent enforcement posture as they would be if the site were listed.

13. EPA worked for eleven months discussing the Superfund Alternative approach with Teck Cominco, and performed an extensive outreach effort to coordinate with all the interested stakeholders, describing the process that would be necessary to postpone listing the Site on the NPL. Of critical importance under EPA's Superfund Alternative Sites guidance is that Teck Cominco must enter an agreement with EPA to perform a RI/FS of the Upper Columbia River Site. The Colville and Spokane Tribes, and Washington State, supported EPA postponing its listing of the Site as long as Teck Cominco agreed to all of the criteria outlined in EPA's Superfund Alternative Sites guidance.

14. After months of inconclusive discussions and ambiguous commitments from TCAI, EPA issued a Special Notice Letter and draft Administrative Order on Consent ("AOC") to Respondent on October 10, 2003, formally requesting the company to voluntarily commit to an AOC for an RI/FS under CERCLA authorities. Consistent with Section 122(e) of CERCLA, 42 U.S.C. § 9622(e), the Special

Notice Letter triggered a 60 day moratorium, and invited Respondent to participate in formal negotiations with EPA.

15. TCAI responded to EPA's Special Notice Letter on behalf of Respondent. At all times relevant to these discussions, EPA agreed that TCAI could sign the RI/FS AOC for the Site as long as Respondent agreed to sign the tolling agreement with the relevant natural resource trustees.

16. EPA and TCAI spent approximately six weeks negotiating the terms for performing an acceptable RI/FS at the Site. Although TCAI expressed a repeated willingness to perform a human health and ecological risk assessment at the Site, under a legally binding contract with any RI/FS at the Site under CERCLA authorities.

17. As a result, EPA concluded that the proposed study that TCAI was willing to perform would not provide the necessary information for EPA to select a remedy that would be protective of human health and the environment. EPA and TCAI ended negotiations on November 26, 2003. EPA wrote TCAI on December 9, 2003, again informing TCAI that the Special Notice Letter Negotiation Moratorium was ended.

18. EPA concluded that TCAI's proposed study would not provide the necessary information for EPA to select a remedy that was protective of human health and the environment because:

a. TCAI would not agree to address environmental and human health cleanup standards in its proposed study;

b. TCAI's proposal was limited to a study of risk only, and used ambiguously defined approaches to address site characterization, data gap analysis, fate and transport issues and alternatives analysis;

c. TCAI proposed a contractual agreement that redefined basic and reliable tenets of the CERCLA RI/FS process so that it was impossible to identify, or later enforce, what

work TCAI was agreeing to perform (e.g., TCAI insisted that its proposed study, called a Human Health/Ecological Risk Assessment, constituted an entire RI/FS study, even though a human health/ecological risk assessment is only one component of EPA's RI/FS process);

d. TCAI would not agree to preserve the rights for trustees to file claims for natural resource damages in the same manner that all US companies in this situation must do.

e. TCAI committed to conduct work only "in general accordance" with EPA Superfund guidance.

III. CONCLUSIONS OF LAW AND DETERMINATIONS

1. The Upper Columbia River Site is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

2. Wastes and constituents thereof at the Site, sent to the Site, disposed of at the Site, and/or transported to the Site identified in Section II are "hazardous substances" as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), or constitute "any pollutant or contaminant" that may present an imminent and substantial danger to public health or welfare under Section 104(a)(1) of CERCLA, 42 U.S.C. § 9604(a)(1).

3. The presence of hazardous substances at the Site or the past, present, or potential migration of hazardous substances currently located at or emanating from the Site, constitute actual and/or threatened "releases" as defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

4. The actual or threatened release of one or more hazardous substances from the Site may present an imminent and substantial endangerment to the public health or welfare or the environment.

5. Respondent is a "person" as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

6. Respondent is a responsible party under Sections 104, 107, and 122 of CERCLA, 42 U.S.C. §§ 9604, 9607, and 9622.

7. The RI/FS required by this Order is necessary to abate an imminent and substantial endangerment because of an actual or threatened release of hazardous substances from the Site and protect the public health or welfare or the environment, is in the public interest, not inconsistent with CERCLA and the NCP, and will expedite effective remedial action.

IV. NOTICE TO THE STATE

On December 8, 2003, prior to issuing this Order, EPA notified the State of Washington Department of Ecology ("DOE") that EPA would be issuing this Order.

V. ORDER

Based on the foregoing, Respondent is hereby ordered to comply with the following provisions, including, but not limited to all attachments to this Order, all documents incorporated by reference into this Order, and all schedules and deadlines in this Order, attached to this Order, or incorporated by reference into this Order.

VI. DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in the statute or its implementing regulations. Whenever terms listed below are used in this Order or in the documents attached to this Order or incorporated by reference into this Order, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 et seq.

b. "Day" shall mean a calendar day unless otherwise specified. In computing any period of time under this Order, in the event that a submission would fall on a Saturday, Sunday, or U.S. federal holiday, the period shall run until the end of the next business day.

c. "DOE" shall mean the Washington State Department of Ecology and any successor departments or agencies of the State of Washington.

d. "EPA" shall mean the United States Environmental Protection Agency.

e. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

f. "National Contingency Plan" or "NCP" shall mean the National Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, including any amendments thereto.

g. "Order" shall mean this Unilateral Administrative Order and all appendices attached hereto. In the event of conflict between this Order and any attachments, this Order shall control.

h. "Paragraph" shall mean a portion of this Order identified by an Arabic numeral.

i. "Parties" shall mean EPA and Respondent.

j. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, et seq. (also known as the Resource Conservation and Recovery Act).

k. "Respondent" shall mean Teck Cominco Metals, Ltd.

l. "Section" shall mean a portion of this Order identified by a Roman numeral and includes one or more paragraphs.

m. "State" shall mean the State of Washington.

n. "Statement of Work" or "SOW" shall mean the statement of work for implementation as set forth in Attachment 1 to this Order. The Statement of Work is incorporated into this Order and is an enforceable part of this Order.

o. "Site" for purposes of this Order shall mean the Upper Columbia River Site that consists of the areal extent of contamination in the Upper Columbia River in the United States, and all suitable areas in the United States in proximity to the contamination necessary for implementation of response action. The Upper Columbia River is the principal inflow, contributing about 90% of the flow from a large drainage area in Canada and the United States, to Franklin D. Roosevelt Lake (Lake Roosevelt), the reservoir behind Grand Coulee Dam. Approximately 15 river miles south of the U.S.-Canada border, the river becomes characteristic of a lake/reservoir due to the Grand Coulee Dam. The Site will include all areas in the United States where hazardous substances from Respondent's Trail operations have migrated or materials containing hazardous substances have come to be placed. The boundaries of the Site will be determined upon the issuance of EPA's Record of Decision after the Remedial Investigation/Feasibility Study is complete.

p. "United States" shall mean the United States of America.

q. "Work" shall mean all activities Respondent is required to perform under this Order, including any activities described in the SOW.

VII. NOTICE OF INTENT TO COMPLY

Respondent shall provide, not later than ten (10) days after the effective date of this Order, written notice to EPA's Remedial Project Manager ("RPM") stating whether it will

comply with the terms of this Order. If Respondent does not perform the Work, EPA may seek to enforce the terms of this Order pursuant to Sections 106(b) and 107(c)(3) of CERCLA. Respondent's written notice shall describe, using facts that exist on or prior to the effective date of this Order, any "sufficient cause" defenses asserted by Respondent under Sections 106(b) and 107(c)(3) of CERCLA. The absence of a response by EPA to the notice required by this Paragraph shall not be deemed to be acceptance of Respondent's assertions.

VIII. PARTIES BOUND

1. This Order shall apply to and be binding upon Respondent and upon its directors, officers, employees, agents, successors, and assigns. No change in the ownership, corporate status, or other control of any of the entities referenced in this Paragraph shall alter any of Respondent's responsibilities under this Order.

2. Respondent shall provide a copy of this Order to any prospective owners or successors before a controlling interest in Respondent's assets, property rights, or stock are transferred to the prospective owner or successor. Respondent shall provide a copy of this Order to each contractor, subcontractor, laboratory, or consultant retained to perform any Work under this Order, within five (5) days after the effective date pursuant to Section XXVI of this Order or on the date such services are retained, whichever date occurs later. Respondent shall also provide a copy of this Order to each person representing Respondent with respect to the Site or the Work and shall condition all contracts and subcontracts entered into hereunder upon performance of the Work in conformity with the terms of this Order. With regard to the activities undertaken pursuant to this Order, each contractor and subcontractor shall be deemed to be related by contract to Respondent within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3). Notwithstanding the

terms of any contract, Respondent is responsible for compliance with this Order and for ensuring that its contractors, subcontractors and agents comply with this Order, and perform any Work in accordance with this Order.

IX. WORK TO BE PERFORMED

1. Respondent shall cooperate with EPA in providing information regarding the Work to the public. As requested by EPA, Respondent shall participate in the preparation of such information for distribution to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Site.

2. All aspects of the Work to be performed by Respondent pursuant to this Order shall be under the direction and supervision of a qualified project manager the selection of which shall be subject to approval by EPA. Within twenty (20) days after the effective date of this Order, Respondent shall notify EPA in writing of the name and qualifications of the project manager, including primary support entities and staff, proposed to be used in carrying out Work under this Order. If at any time Respondent proposes to use a different project manager, Respondent shall notify EPA and shall obtain approval from EPA before the new project manager performs any Work under this Order.

3. EPA will review Respondent's selection of a project manager according to the terms of Section IX Paragraph 2 of this Order. If EPA disapproves of the selection of the project manager, Respondent shall submit to EPA within five (5) days after receipt of EPA's disapproval of the project manager previously selected, a list of project managers, including primary support entities and staff, that would be acceptable to Respondent. EPA will thereafter provide written notice to Respondent of the names of the project managers that are acceptable to EPA. Respondent may then select any approved project manager from that list and shall notify EPA of the

name of the project manager selected within twenty-one (21) days of EPA's designation of approved project managers.

4. Respondent shall conduct the RI/FS and submit deliverables as provided by the Statement of Work ("SOW"), Attachment 1. All such work shall be conducted in accordance with CERCLA, the NCP, and EPA guidance including, but not limited to, the "Interim Final Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA" (OSWER Directive #9355.3-01), "Guidance for Data Usability in Risk Assessment" (OSWER Directive #9285.7-05) and guidances referenced therein, and guidances referenced in the SOW, as may be amended or modified by EPA. The tasks that Respondent must perform are described more fully in the SOW. The activities and deliverables identified below shall be developed as provided in the SOW, and shall be submitted to EPA as provided. All work performed under this Order shall be in accordance with the schedules herein, and in full accordance with requirements of the SOW, as initially approved or modified by EPA, and as may be amended or modified by EPA from time to time.

5. REMEDIAL INVESTIGATION/FEASIBILITY STUDY

a. The overall purpose of the RI/FS is to investigate and determine the full nature and horizontal and vertical extent of contamination at the Upper Columbia River Site, including all areas where contamination or contaminated material from Respondent's Trail facility has migrated or come to be placed, to develop and evaluate potential remedial alternatives that will prevent, mitigate or otherwise respond to or remedy any release or threatened release of hazardous substances, pollutants or contaminants at or from the Site and that will be protective of human health and the environment. Respondent shall perform, at a minimum, all actions necessary to implement the work described in the SOW.

b. Work Plan and Implementation

i. As part of the work described in Section IX Paragraph 5 and in the SOW, the Respondent must submit a schedule for implementation of the required activities which shall include specific initiation and completion dates, and draft and final document submittal dates. The Respondent shall submit to EPA for review and comment work plans for performing the RI/FS activities set forth below and in the SOW. The work plans shall provide a description of, and a schedule for, the RI/FS activities required by this Order.

ii. EPA may approve, disapprove, require revisions to, or modify any work plan. If EPA requires revisions to any work plan, the Respondent shall submit a revised work plan within fifteen (15) days of receipt of EPA's notification of the required revisions. The Respondent shall implement each work plan as approved by EPA in accordance with the schedule approved by EPA. Once approved, or approved with modifications, each work plan, schedule, and any subsequent modifications shall be fully enforceable under this Order. The Respondent shall give EPA at least fourteen (14) days advanced notice of all field work or field activities to be performed by Respondent pursuant to Section IX Paragraph 5 of this Order.

iii. Respondent shall not commence or undertake any subsequent activities or tasks until receiving EPA approval for the RI/FS Work Plan.

iv. EPA reserves the right to stop Respondent from proceeding further, either temporarily or permanently, on any task, activity or deliverable at any point during the RI/FS.

v. Respondent shall assure that all work performed, samples taken and analyses conducted pursuant to Section IX Paragraph 5 of this Order, conform to the requirements of the RI/FS Work Plan and the EPA-approved quality assurance project plan (QAPP). Respondent shall assure that field per-

sonnel used by Respondent are properly trained in the use of field equipment and in chain of custody procedures.

c. Reporting. All work plans, reports, notices and other documents required to be submitted to EPA under this Order shall be sent by certified mail, return receipt requested, by overnight delivery or by courier. Respondent shall submit to EPA three (3) hard copies, one of which shall be unbound, and one (1) electronic copy of all work plans, reports, or other submissions required by this Order and the SOW. In preparation for the Scoping Meeting, within forty-five (45) days of this Order, Respondent shall provide a document detailing Existing Site Information, as required under Task 1 of the SOW. At the RI/FS Scoping meeting pursuant to Section IX Paragraph 5, EPA will provide Respondent with a list of additional state and peer review contacts that Respondent shall provide copies of all plans, reports or other submissions which are required by this Order, at the same time that Respondent makes the submission to EPA.

d. Scoping Meeting. Within sixty (60) days of the effective date of this Order, Respondent shall meet with EPA to discuss RI/FS Scoping Activities under Task 1, of the SOW. During the Scoping Meeting, appropriate deliverable dates for the tasks and deliverables outlined in the SOW will be determined.

e. Within thirty (30) days of the RI/FS Scoping Activities meeting, Respondent shall submit a Site Management Plan ("SMP") for the RI/FS to EPA. The SMP shall contain the project scope, general management approach and schedule for submittal of all workplans and documents pursuant to the SOW. If EPA disapproves of or requires revisions to the SMP, in whole or in part, Respondent shall amend and submit to EPA a revised SMP which is responsive to the directions in all EPA comments, within fifteen (15) days of receiving EPA's comments.

6. In the event that Respondent amends or revises a report, plan or other submittal upon receipt of EPA comments, if EPA in its discretion subsequently disapproves of the revised submittal or any portion thereof, or if subsequent submittals do not fully reflect EPA's directions for changes related to performance of the RI/FS, EPA retains the right, in its sole discretion, to seek statutory penalties, perform its own studies, complete the RI/FS (or any portion of the RI/FS) under CERCLA and the NCP, and seek reimbursement from the Respondent for its costs; and/or seek any other appropriate relief.

7. In the event that EPA takes over some of the tasks, but not the entire RI/FS, Respondent shall incorporate and integrate information supplied by EPA into the final RI/FS report, as applicable.

8. Neither failure of EPA to expressly approve or disapprove of Respondent's submissions within any time period, nor the absence of comments, shall be construed as approval by EPA.

9. Respondent shall, no less than ten (10) days prior to any off-site shipment of hazardous substances from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving state and to EPA's RPM of such shipment of hazardous substances within the time frame given in the SOW. However, the notification of shipments shall not apply to any such off-site shipments when the total volume of such shipments will not exceed 10 cubic yards.

a. The notification shall be in writing, and shall include the following information: (1) the name and location of the facility to which the hazardous substances are to be shipped; (2) the type and quantity of the hazardous substances to be shipped; (3) the expected schedule for the shipment of the hazardous substances; and (4) the method of transportation. Respondent shall notify the receiving state of any major

change in the shipment plan, such as a decision to ship the hazardous substances to another facility within the same state, or to a facility in another state.

b. The identity of the receiving facility and state will be determined by Respondent following the award of the contract for any phase of the Work. Respondent shall provide to EPA all information on the off-site shipments, including but not limited to, all information included in Section IX Paragraph 9. a. Respondent shall provide the off-site shipment information as soon as practical after the award of the contract and before the hazardous substances are actually shipped.

c. All hazardous substances, pollutants or contaminants removed off-site pursuant to this Order for treatment, storage, or disposal shall be treated, stored, or disposed of at a facility in compliance, as determined by EPA, pursuant to 42 U.S.C.§ 9621(d)(3) and the off-site rule at 40 C.F.R. 300.440. Regional Offices will provide information on the acceptability of a facility under section 121(d)(3) of CERCLA and the rule.

X. MODIFICATION OF THE WORK PLANS

1. Modifications to any plan or schedule or the attached EPA SOW may be made in writing by the RPM or at their oral direction. If the RPM makes an oral modification, it will be memorialized in writing within two (2) days by the RPM; provided, however, that the effective date of the modification shall be the date of the RPM's oral direction. The rest of the Order, or any other portion of the Order may only be modified in writing by signature of the delegated signatory or designee of EPA Region 10.

2. If Respondent seeks permission to deviate from any approved plan or schedule or SOW, Respondent's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis.

3. No informal advice, guidance, suggestion, or comment by EPA regarding reports, plans, specifications, schedules, or any other writing submitted by the Respondent shall relieve the Respondent of its obligation to obtain such formal approval as may be required by this Order, and to comply with all requirements of this Order unless it is formally modified.

XI. ADDITIONAL RESPONSE ACTIONS

If EPA determines that additional response actions not included in an approved plan are necessary to protect public health, welfare, or the environment, EPA will notify Respondent of that determination. Unless otherwise stated by EPA, within fifteen (15) days of receipt of notice from EPA that additional response actions are necessary to protect public health, welfare, or the environment, Respondent shall submit for approval by EPA a Work Plan for the additional response actions. The plan shall conform to the applicable requirements of this Order and the SOW to this Order. Upon EPA's approval of the plan, Respondent shall implement the plan for additional response actions in accordance with the provisions and schedule contained therein. This Section does not alter or diminish the RPM's authority to make oral or written modifications to any plan or schedule pursuant to Section X of this Order.

XII. FINAL REPORTS, PROPOSED PLANS, RECORD OF DECISION AND ADMINISTRATIVE RECORD

1. EPA shall be responsible for the release to the public of the final reports on the RI/FS. EPA shall be responsible for the preparation and release to the public of the proposed plan and Record of Decision in accordance with CERCLA and the NCP.

2. EPA shall provide Respondent with the final reports on the RI/FS as well as any Record of Decision.

3. EPA will determine the contents of the Administrative Record file for selection of any response action. The Administrative Record file shall include those materials cited in 40 C.F.R. 300.810. Respondent must submit to EPA all documents concerning the Site, developed during the course of the RI/FS which must be included in the Administrative Record file pursuant to 40 C.F.R. 300.810. EPA may require Respondent to establish a community information repository at or near the Site, to house one copy of the Administrative Record.

XIII. PROGRESS REPORTS

In addition to the deliverables set forth in this Order, Respondent shall provide to EPA monthly progress reports no later than the 10th day of the following month. At a minimum, with respect to the preceding month, these progress reports shall: (1) describe the actions which have been taken to comply with this Order during that month; (2) include all results of sampling and tests and all other data received by Respondent; (3) describe work planned for the next two months with schedules relating such work to the overall project schedule for the Work; and (4) describe all problems encountered and any anticipated problems, any actual or anticipated delays, and solutions developed and implemented to address any actual or anticipated problems or delays.

XIV. SAMPLING, ACCESS, AND DATA AVAILABILITY/ADMISSIBILITY

1. All sampling and analyses performed pursuant to this Order shall conform to EPA direction and approval regarding sampling, quality assurance/quality control (QA/QC), data validation, and chain of custody procedures. Respondent shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance. Respondent shall follow the following documents as appropriate as guidance for QA/QC and sampling: "EPA Requirements for Quality Assurance Project

Plans" (QA/R-5) (120KB)–March 2001, EPA/240/B-01/003; "Guidance on Choosing a Sampling Design for Environmental Data Collection" (G-5S) (1046KB), December 2002, EPA/240/R-02/005.

2. Upon request by EPA, Respondent shall have such a laboratory analyze samples submitted by EPA for quality-assurance monitoring. Respondent shall provide to EPA the quality assurance/quality control procedures followed by all sampling teams and laboratories performing data collection and/or analysis. Respondent shall only use laboratories that have a documented quality system which complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995) and "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditations Program (NELAP) as meeting the quality system requirements.

3. Upon request by EPA, the Respondent shall allow EPA or its authorized representatives to take split and/or duplicate samples. The Respondent shall notify EPA at least fifteen (15) days in advance of any sample collection activity, unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Respondent to take split or duplicate samples of any samples it takes as part of its oversight of Respondent's implementation of the Work

4. Respondent may assert a claim of business confidentiality covering part or all of the information submitted to EPA pursuant to the terms of this Order under 40 C.F.R. Section 2.20, provided such claim is allowed by Section 104(e)(7) of CERCLA, 42 U.S.C. Section 9604(e)(7). This claim shall be asserted in the manner described by 40 C.F.R.

Section 2.203(b) and substantiated at the time the claim is made. Information determined to be confidential by EPA will be given the protection specified in 40 C.F.R. Part 2. If no such claim accompanies the information when it is submitted to EPA, it may be made available to the public by EPA or the state without further notice to Respondent. Respondent agrees not to assert confidentiality claims with respect to any data related to Site conditions, sampling, or monitoring.

5. Respondent shall provide and/or obtain access to the Site and off-Site areas owned and/or controlled by Respondent, to which access is necessary to implement this Order, and provide access to all records and documentation related to the conditions at the Site and the action conducted pursuant to this Order. Such access shall be provided to EPA employees, contractors, agents, consultants, designees, representatives, and State of Washington representatives. These individuals shall be permitted to move freely at the Site and appropriate off-site areas in order to conduct actions which EPA determines to be necessary.

6. If the Site, the off-Site area, or other property subject to or affected by the cleanup, or where documents required to be prepared or maintained by this Order are located, is controlled or owned in whole or in part by parties other than Respondent, Respondent will obtain, or use their best efforts to obtain, access agreements from such parties. Such agreements shall provide access for EPA, its contractors and oversight officials, the State and its contractors, and Respondent or Respondent's authorized representatives and contractors, and such agreements shall specify that Respondent is not EPA's representative with respect to liability associated with Site activities. Copies of such agreements shall be provided to EPA prior to Respondent's initiation of field activities. Respondent's best efforts shall include providing reasonable compensation to any off-Site property owner.

7. If access agreements are not obtained within the time referenced above, Respondent shall immediately notify EPA in writing of its failure to obtain access. EPA may use its legal authorities to obtain access for Respondent, may perform those tasks or activities requiring access with EPA contractors, or may terminate the Order if Respondent cannot obtain access agreements. If EPA performs those tasks or activities requiring access with EPA contractors and does not terminate the Order, Respondent shall perform all other activities not requiring such access. Respondent shall integrate the results of any such tasks undertaken by EPA into its reports and deliverables. EPA reserves the right to seek cost recovery for all costs and attorney fees incurred by the United States to obtain access for Respondent.

8. Notwithstanding any provision of this Order, the United States retains all of its access authorities and rights under CERCLA and any other applicable statutes or regulations.

XV. RECORD PRESERVATION

Respondent shall preserve all records and documents in its possession that relate in any way to the Site during the conduct of Work required by this Order and for a minimum of ten (10) years after commencement of construction of any response action. Respondent shall acquire and retain copies of all documents that relate to the site and are in the possession of its employees, agents, accountants, contractors, or attorneys. After this ten (10) year period, Respondent shall notify EPA at least ninety (90) days before the documents are scheduled to be destroyed. If EPA requests that the documents be saved, Respondent shall, at no cost to EPA, give EPA the documents or copies of the documents.

XVI. ENDANGERMENT AND EMERGENCY RESPONSE

1. In the event of any action or occurrence during the performance of the Work which causes or threatens to cause a release of a hazardous substance or which may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action to prevent, abate, or minimize the threat, and shall immediately notify EPA's RPM. If the RPM is unavailable Respondent shall notify the EPA Office of Emergency Response, Region 10 Duty Officer at (800) 424-8802 or (206) 553-1263 of the incident or Site conditions. Respondent shall take such action in consultation with EPA's RPM and in accordance with all applicable provisions of this Order, including but not limited to the Health and Safety Plan. In the event that Respondent fails to take appropriate response action as required by this Section, and EPA takes that action instead, EPA reserves the right to seek reimbursement from Respondent for all costs incurred by the United States.

2. In addition, in the event of any reportable release of a hazardous substance from the Site, Respondent shall immediately notify the Emergency Response Duty OSC at (206) 553-1263 and the National Response Center at (800) 424-8802. Respondent shall submit a written report to EPA within seven (7) days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

3. Nothing in the preceding Paragraph shall be deemed to limit any authority of the United States to take, direct, or

order all appropriate action to protect human health and the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances on, at, or from the Site.

XVII. EPA REVIEW OF SUBMISSIONS

1. After review of any deliverable, plan, report or other item which is required to be submitted for review and approval pursuant to this Order, EPA may: (a) approve the submission; (b) approve the submission with modifications; (c) disapprove the submission and direct Respondent to resubmit the document after incorporating EPA's comments; or (d) disapprove the submission and assume responsibility for performing all or any part of the response action. As used in this Order, the terms "approval by EPA," "EPA approval," or a similar term means the action described in Subparagraphs (a) or (b) of this Paragraph.

2. In the event of approval or approval with modifications by EPA, Respondent shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA.

3. Upon receipt of a notice of disapproval pursuant to Section XVII Paragraph 1(c) of this Order or a request for a modification pursuant to Section XVII Paragraph 1(b), Respondent shall, within fifteen (15) days or such longer time as specified by EPA, correct the deficiencies and resubmit the plan, report, or other item for approval. Notwithstanding the notice of disapproval, or approval with modifications, Respondent shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission.

4. If any submission is disapproved by EPA pursuant to Section XVII, Paragraph 1(d) of this Order, Respondent shall be deemed to be in violation of this Order.

XVIII. COMPLIANCE WITH APPLICABLE LAWS

1. All activities by Respondent pursuant to this Order shall be performed in accordance with the requirements of all federal and state laws and regulations. EPA has determined that the activities contemplated by this Order are consistent with the NCP.

2. Respondent shall perform all actions required pursuant to this Order in accordance with all applicable local, tribal, state, and federal laws and regulations except as provided in CERCLA section 121(e) and 40 C.F.R. section 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-site actions required pursuant to this Order shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements (ARARs) under federal environmental, state environmental, tribal environmental, or facility siting laws. Respondent shall identify ARARs in the Work Plan subject to EPA approval.

3. This Order is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

XIX. REMEDIAL PROJECT MANAGER

1. All communications, whether written or oral, from Respondent to EPA shall be directed to EPA's RPM. Respondent shall submit to EPA three (3) copies of all documents, including plans, reports, and other correspondence, which are developed pursuant to this Order, and shall send these documents by certified mail, return receipt requested or overnight delivery. Documents shall also be provided in electronic format.

EPA's RPM is: Sally Thomas
EPA Project Coordinator
Environmental Cleanup Office
U.S. Environmental Protection Agency

Region 10
1200 Sixth Avenue, Mail Code ECL-113
Seattle, Washington 98101
(206) 553-2102

2. EPA has the unreviewable right to change its RPM. If EPA changes its RPM, EPA will inform Respondent in writing of the name, address, and telephone number of the new RPM.

3. EPA's RPM shall have the authority lawfully vested in the RPM, by the National Contingency Plan, 40 C.F.R. Part 300. EPA's RPM shall have authority, consistent with the National Contingency Plan, to halt any work required by this Order, and to take any necessary response action.

XX. DELAY IN PERFORMANCE

1. Any delay in performance of Work required under this Order that, in EPA's judgment, is properly justified by Respondent under the terms of this Section shall not be considered a violation of this Order. Any delay in performance of a specific task required under this Order shall not affect Respondent's obligations to fully perform all other obligations under the terms and conditions of this Order.

2. Respondent shall notify EPA of any delay or anticipated delay in performing any requirement of this Order. Such notification shall be made by telephone to EPA's RPM, as appropriate, within 48 hours after Respondent first knew or should have known that a delay might occur. Respondent shall adopt all reasonable measures to avoid or minimize any such delay. Within five (5) business days after notifying EPA by telephone, Respondent shall provide written notification fully describing the nature of the delay, any justification for delay, any reason why Respondent should not be held strictly accountable for failing to comply with any relevant requirements of this Order, the measures planned and taken to minimize the delay, and a schedule for implementing the measures that will be taken to mitigate the effect of the delay.

EPA may, in its sole and unreviewable discretion, grant an extension of any schedule for good cause shown. Increased costs or expenses associated with implementation of the activities called for in this Order are not a justification for any delay in performance.

XXI. ASSURANCE OF ABILITY TO COMPLETE WORK

1. Within thirty (30) days after approval of any Work Plan for any response action, Respondent shall demonstrate its ability to complete the Work specified by the Work Plan and to pay all claims that arise from the performance of such Work by obtaining and presenting to EPA one of the following: (1) a performance bond; (2) a letter of credit; (3) a guarantee by a third party; or (4) internal financial information to allow EPA to determine that Respondent has sufficient assets available to perform the Work. Respondent shall demonstrate financial assurance in an amount no less than the estimate of cost for the response actions described in the Work Plan. If Respondent seeks to demonstrate ability to complete the response actions by means of internal financial information, or by guarantee of a third party, it shall re-submit such information annually. If EPA determines that such financial information is inadequate, Respondent shall, within thirty (30) days after receipt of EPA's notice of determination, obtain and present to EPA for approval one of the other three forms of financial assurance listed above.

2. At least seven (7) days prior to commencing any Work at the Site pursuant to this Order, Respondent shall submit to EPA a certification that Respondent or its contractors and subcontractors have adequate insurance coverage or have indemnification for liabilities for injuries or damages to persons or property which may result from the activities to be conducted by or on behalf of Respondent pursuant to this Order. Respondent shall ensure that such insurance or in-

demnification is maintained for the duration of the Work required by this Order.

XXII. UNITED STATES NOT LIABLE

The United States, by issuance of this Order, assumes no liability for any injuries or damages to persons or property resulting from acts or omissions by Respondent, or its directors, officers, employees, agents, representatives, successors, assigns, contractors, or consultants in carrying out any action or activity pursuant to this Order. Neither EPA nor the United States may be deemed to be a party to any contract entered into by Respondent or its directors, officers, employees, agents, successors, assigns, contractors, or consultants in carrying out any action or activity pursuant to this Order.

XXIII. ENFORCEMENT AND RESERVATIONS

1. EPA reserves the right to bring an action against Respondent under Section 107 of CERCLA, 42 U.S.C. § 9607, for recovery of any response costs incurred by the United States related to the Site and not reimbursed by Respondent. This reservation shall include but not be limited to past costs, direct costs, indirect costs, the costs of oversight, the costs of compiling the cost documentation to support oversight cost demand, as well as accrued interest as provided in Section 107(a) of CERCLA.

2. Notwithstanding any other provision of this Order, at any time during the response action, EPA may perform its own studies, complete the response action (or any portion of the response action) as provided in CERCLA and the NCP, and seek reimbursement from Respondent for its costs, or seek any other appropriate relief.

3. Nothing in this Order shall preclude EPA from taking any additional enforcement actions, including modification of this Order or issuance of additional Orders, and/or additional remedial or removal actions as EPA may deem necessary, or from requiring Respondent in the future to perform

additional activities pursuant to CERCLA, 42 U.S.C. § 9606(a), et seq., or any other applicable law. Respondent shall be liable under CERCLA Section 107(a), 42 U.S.C. § 9607(a), for the costs of any such additional actions.

4. Notwithstanding any provision of this Order, the United States hereby retains all of its information gathering, inspection and enforcement authorities and rights under CERCLA, RCRA and any other applicable statutes or regulations.

5. As provided in Section 106(b) of CERCLA, 42 U.S.C. § 9606(b), any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under Section 106(a) may, in an action brought in the appropriate United States district court to enforce such order, be fined not more that $27,500 for each day in which such violation occurs or such failure to comply continues. Moreover, under Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), "[i]f any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action."

6. Nothing in this Order shall constitute or be construed as a release from any claim, cause of action or demand in law or equity against any person for any liability it may have arising out of or relating in any way to the Site.

7. If a court issues an order that invalidates any provision of this Order or finds that Respondent has sufficient cause not to comply with one or more provisions of this Order, Respondent shall remain bound to comply with all provisions of this Order not invalidated by the court's order.

XXIV. ADMINISTRATIVE RECORD

The Administrative Record file supporting these response actions is available for review at EPA Region 10 offices located at 1200 6th Avenue, Seattle, Washington.

XXV. OPPORTUNITY TO CONFER

1. Respondent may, before the effective date of this Order, request a conference with EPA to discuss this Order. If requested, the conference shall occur within seven (7) days of Respondent's request for a conference.

2. The purpose and scope of the conference shall be limited to issues regarding Respondent's compliance with the Order, implementation of the Work required by this Order and Respondent's intentions with respect to compliance with this Order. This conference is not an evidentiary hearing, and does not constitute a proceeding to challenge this Order. It does not give Respondent a right to seek review of this Order, or to seek resolution of potential liability, and no official stenographic record of the conference will be made. At any conference held pursuant to Respondent's request, Respondent may appear in person or be represented by an attorney or other representative.

3. Requests for a conference must be by telephone followed by written confirmation mailed that day to Cara Steiner-Riley, Assistant Regional Counsel, 1200 6th Ave., Seattle, WA 98101 at (206) 553-1142.

XXVI. EFFECTIVE DATE AND COMPUTATION OF TIME

This Order shall be effective twenty (20) days after the day it is received by Respondent, unless a conference is requested as provided herein. All times for performance of ordered activities shall be calculated from this effective date. If a conference is requested, this order shall be effective ten (10) days after the day of the conference unless modified in writing by EPA.

So Ordered, this 11th day of December, 2003.

By: /s/_____
Michael F. Gearheard, Director
Environmental Cleanup Office
Region 10
U.S. Environmental Protection Agency

EFFECTIVE DATE:_____

APPENDIX F

Canadian Embassy

Ambassador
Du Canada

Note No. 0001

The Embassy of Canada presents its compliments to the Department of State of the United States of America and has the honour to refer to the Unilateral Administrative Order (UAO) for Remedial Investigation/Feasibility Study issued on December 11, 2003 by the United States Environmental Protection Agency (EPA), Region 10 to Teck Cominco Metals Ltd. regarding the Columbia River in the State of Washington.

The Government of Canada is concerned that the EPA is attempting to enforce the U.S. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) on Teck Cominco Metals, a Canadian company operating in Canadian territory.

Canada does not believe that CERCLA applies to Teck Cominco Metals and is concerned that the issuance of the Unilateral Administrative Order may set an unfortunate precedent, by causing transboundary environmental liability cases to be initiated in both Canada and the United States.

Canada encourages the EPA to rescind the Unilateral Administrative Order and to re-examine the offer made by Teck Cominco to undertake an environmental and health risk

assessment. Canada hopes that the EPA and Teck Cominco Metals will work together to develop a mutually acceptable and enforceable agreement, in the spirit of the long history of joint Canadian-U.S. stewardship of our shared environment. The Embassy of Canada avails itself of this opportunity to renew to the Department of State of the United States of America the assurances of its highest consideration.

Washington, D.C.

January 3, 2004

APPENDIX G

BY FAX AND
COURIER

teckcominco

January 12, 2004

G. Leonard Manuel
Vice President & General Counsel
Direct Dial: (604) 685 3012
Faxcom: (604) 844 2509
Email: len.manuel@teckcominco.com

Mr. Michael F. Gearheard
Director, Environmental Cleanup Office
United States Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, Washington 98101
USA

Dear Mr. Gearheard:

Teck Cominco Metals Ltd. (TCML) has received and reviewed your letter of December 11, 2003, and the enclosed Unilateral Administrative Order (UAO) under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) directing TCML to perform a Remedial Investigation and Feasibility Study for the Upper Columbia River Site (Site), in conformance with an attached Scope of Work. That Site includes the Columbia River from the Grand Coulee Dam north to the US/Canada border. In issuing the UAO to TCML, EPA Region 10 alleges that contaminants, including slag, were discharged from TCML's Trail Smeller into the Columbia River. The Trail Smelter is located in Trail, British Columbia and the alleged discharges

occurred wholly within Canada. Although the UAO also alleges that numerous other facilities, both within and outside the United States, and owned or operated by persons other than TCML, have released hazardous substances at the Site, the UAO is directed solely to TCML.

As EPA has acknowledged, this effort to use CERCLA to attach liability based on discharges from a facility physically located outside the United States, and not otherwise subject to its jurisdiction, is unprecedented, and inconsistent with the cooperative approach taken by the United States and Canada in dealing with other situations involving transboundary pollution over the last century. We understand that the Canadian government has formally advised the United States that it opposes the extraterritorial application of CERCLA to facilities in Canada.

EPA's effort to expand the application of CERCLA outside the United States is also not supported by any reasonable reading of the language of CERCLA. Indeed, any contrary reading would leave foreign facilities, including those owned or operated by foreign governmental entities, subject to the vast, fully retroactive liability net of CERCLA with even fewer defenses than those available to domestic parties. Accordingly, TCML holds firmly to the view that the alleged discharges from the Trail Smelter provide no basis for issuing this UAO to TCML, or otherwise making TCML a liable party under CERCLA.

However, as we have also made clear to EPA Region 10 in our discussions over the past year, TCML is willing to assume voluntarily the costs of investigation of the alleged contamination from the Trail Smelter, and the costs of appropriately addressing risks from that contamination. In confirmation of that position, TCML encloses with this letter an enforceable agreement setting forth that commitment unequivocally, along with its commitment to address appropriately

risks to human health and the environment attributable to the Trail Smelter identified in the investigation.

We look forward to working with EPA to address contamination in the Upper Columbia River Site as promptly as possible in a responsible way, using sound science to identify and respond appropriately to the identified risks.

Yours truly,

/s/

G. Leonard Manuel
Vice President & General Counsel

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation, Plaintiffs, and TECK COMINCO METALS, LTD., a Canadian corporation, Defendant.	NO. **CV-04-0256-AM** COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND FOR CIVIL PENALTIES

I. INTRODUCTION

1.1 This action is brought under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, citizens suit provision, 42 U.S.C. § 9659(a)(1), to enforce the Unilateral Administrative Order for Remedial Investigation/Feasibility

Study ("UAO") issued to Teck Cominco Metals, Ltd. ("Teck Cominco"), Docket No. CERCLA 10-2004-0018, on December 11, 2003, by the United States Environmental Protection Agency ("EPA") pursuant to its authority under 42 U.S.C. § 9606(a).

II. PARTIES

2.1 Joseph A. Pakootas ("Pakootas") is an enrolled member of the Confederated Tribes of the Colville Reservation ("Tribes"), a sovereign Indian Tribe whose government is recognized by the United States, and a resident of Inchelium, Washington, located within the exterior boundaries of the Colville Reservation.

2.2 Donald R. Michel ("Michel") is an enrolled member of the Tribes and a resident of Inchelium, Washington, located within the exterior boundaries of the Colville Reservation.

2.3 Teck Comino is a Canadian corporation registered as an extra provincial company under the laws of British Columbia. Teck Cominco owns and operates the world's largest integrated lead-zinc smelting and refining complex in Trail, British Columbia, Canada ("Cominco Smelter"), located approximately 10 river miles north of the United States-Canada border ("Border").

III. JURISDICTION AND VENUE

3.1 This Court has jurisdiction of this citizens suit brought to enforce an order which has become effective pursuant to CERCLA, to order such action as may be necessary to correct the violation of the order, and to impose civil penalties. 42 U.S.C. § 9659(c).

3.2 Pursuant to 42 U.S.C. § 9659(d)(1), Plaintiffs provided notice of the alleged violations of the UAO and Plaintiffs' intent to sue to Teck Cominco, the Administrator of EPA, the United States Attorney General, the Attorney Gen-

eral of the State of Washington, and the Regional Administrator of EPA Region 10.

3.3 More than sixty (60) days have passed since notice was provided, and Teck Cominco continues to violate the UAO by refusing to comply with its provisions. To date, EPA has not taken action under CERCLA to enforce the UAO, and has neither commenced nor is diligently prosecuting a court action to redress this violation.

3.4 42 U.S.C. § 9659(b)(1) provides for venue in this Court.

IV. FACTUAL ALLEGATIONS

A. Teck Cominco Released Slag Containing Hazardous Substances into the Columbia River.

4.1 From approximately 1906 to mid-1995, Teck Cominco generated and disposed of certain hazardous substances in liquid and solid form, including, but not limited to arsenic, cadmium, copper, mercury, lead, and zinc (hereinafter, "slag") directly into the Columbia River. Prior to mid-1995, the Cominco Smelter discharged up to 145,000 tons of slag each year directly into the Columbia River. The slag generated and disposed of by Teck Cominco into the Columbia River is carried downstream into waters of the United States.

4.2 Over time a significant volume of slag and the hazardous substances contained therein have accumulated and cause continuing impacts to the surface water and ground water, sediments, and biological resources which comprise the Upper Columbia River and Franklin D. Roosevelt Lake ("Lake Roosevelt").

4.3 Technical evidence, including distinct time frame dated chemical and physical analyses of the characteristics of the slag obtained in core samples, shows with scientific certainty that the predominant source of slag in the Upper Columbia River and Lake Roosevelt originates from the

Cominco Smelter. Evidence shows that the physical and chemical decay of slag, and the subsequent release of trace elements in the form of arsenic, cadmium, cooper, zinc, and lead, is an ongoing process in the in the buried slag and sediment of the Upper Columbia River and Lake Roosevelt.

B. Teck Cominco Slag is Toxic to Humans and to Aquatic Life.

4.4 The contaminants deposited by Teck Cominco into the Columbia River and ultimately Lake Roosevelt are toxic to humans and to aquatic life. As stated in the UAO:

4.4.1 Humans are exposed to slag and contaminated sediment by direct contact with slag on the beaches of the Upper Columbia River and Lake Roosevelt, contact with contaminated sediment during low draw down periods, inhalation of airborne particles, dermal contact, and ingestion. In addition, humans are exposed from ingestion of water from the Upper Columbia River or Lake Roosevelt. and through consumption of fish, aquatic resources, native plants, and agricultural crops.

4.4.2 Environmental effects of slag include both chemical (increased metal loads, potential bioaccumulation, toxicity problems in biota) and physical (scouring of plants and animals in substrates, severe erosion of fish gills, smothering of habitat) components.

C. Teck Cominco Slag has Damaged and Continues to Damage Pakootas and Michel.

4.5 Pakootas and Michel live within the exterior boundaries of the Colville Reservation. The Colville Reservation is diverse with natural resources including the Upper Columbia River and Lake Roosevelt, standing timber, streams, lakes, minerals, native plants, fish, and wildlife.

4.6 Pakootas and Michel fish and recreate in the Columbia River and Lake Roosevelt. Pakootas and Michel walk along the beaches and camp on the shores of the Co-

lumbia River and Lake Roosevelt. These activities, of central importance to Pakootas' and Michel's subsistence, culture, and spiritual well-being, expose Pakootas and Michel to the hazardous contaminants discharged by Teck Cominco into the Columbia River.

4.7 Pakootas and Michel, as members of the Tribes, have expressly reserved hunting, fishing, and gathering rights and entitlements to the Columbia River that are impaired by Teck Cominco's discharge of hazardous slag into the Columbia River.

D. EPA Issued Teck Cominco a UAO Concerning the Preparation and Performance of a RI/FS at the Upper Columbia River Site.

4.8 On December 11, 2003, EPA issued Teck Cominco the UAO.

4.9 EPA is aware that Teck Cominco has violated and continues to violate CERCLA by failing to fulfill its obligation to comply with the UAO. In particular, EPA is aware, *inter alia*, that Teck Cominco has violated and continues to violate 42 U.S.C. § 9606(a) as follows:

4.9.1 Teck Cominco has failed to comply with the terms and conditions of the December 11, 2003, UAO. Teck Cominco's failure to comply with the UAO constitutes a violation of a condition, requirement, or order which has become effective under CERCLA.

4.9.2 Teck Cominco has failed to provide EPA with notice of its intent to comply with the terms of the UAO within ten days of the effective date of the UAO, in violation of § VII of the UAO. To the contrary, Teck Cominco unequivocally indicated its intent not to comply with the terms of the UAO by its January 12, 2004, letter dated from G. Leonard Manuel directed to Michael F. Gearheard. Teck Cominco's conduct constitutes a violation of a condition, requirement, or order which has become effective under CERCLA.

4.9.3 Teck Cominco has failed to perform the RI/FS and submit deliverables as provided in the Statement of Work, Attachment 1 to the UAO, in violation of § IX(4) of the UAO. Teck Cominco's conduct constitutes a violation of a condition, requirement, or order which has become effective under CERCLA.

4.10 EPA has failed to enforce the UAO. Enforcement of the UAO pursuant to CERCLA is necessary to protect the health and welfare of the Plaintiffs and the quality of the Reservation Environment from the adverse impacts resulting from the hazardous substances released by Teck Cominco into the Columbia River. Teck Cominco's failure to comply with the UAO adversely affects Pakootas and Michel.

4.11 Pursuant to 42 U.S.C. § 9659(d)(1), Pakootas and Michel provided notice of the alleged violations and of their intent to sue to Teck Cominco, the Administrator of EPA, the United States Attorney General, the Attorney General of the State of Washington, and the Regional Administrator of Region 10 EPA.

4.12 More than sixty days have passed since notice was served, and the violations complained of in the notice are continuing. Teck Cominco is in violation of the UAO. EPA has not commenced and diligently prosecuted a court action to redress this violation.

V. FIRST CLAIM FOR RELIEF: DECLARATORY RELIEF UNDER CERCLA

5.1 Pakootas and Michel reallege and incorporate by reference paragraphs 1.1 through 4.12.

5.2 Teck Cominco has violated and continues to violate CERCLA by failing to fulfill its obligation to comply with the UAO.

5.3 Pakootas and Michel are entitled to a declaration by this Court that Teck Cominco has violated and continues to

violate the UAO and accordingly, has violated and continues to violate CERCLA.

VI. SECOND CLAIM FOR RELIEF: INJUNCTIVE RELIEF UNDER CERCLA

6.1 Pakootas and Michel reallege and incorporate by this reference paragraphs 1.1 though 4.12.

6.2 Teck Cominco has violated and continues to violate CERCLA by failing to fulfill its obligation to comply with the UAO.

6.3 Pakootas and Michel are entitled to an order enforcing the UAO against Teck Cominco.

6.4 Pakootas and Michel are entitled to an order ordering such action as may be necessary to correct Teck Cominco's violations of the UAO and accordingly, violations of CERCLA.

VII. PRAYER FOR RELIEF

THEREFORE, having alleged the foregoing facts and causes of action against Teck Cominco, Pakootas and Michel pray for the following relief:

1. A declaration by the Court that Teck Cominco has violated and continues to violate CERCLA;

2. An order enforcing the UAO against Teck Cominco.

3. An order ordering such action as may be necessary to compel Teck Cominco to correct its violations of the UAO and accordingly, its violations of CERCLA.

4. An order requiring the payment of civil penalties to the maximum extent permitted by CERCLA for each day during which the violation of the UAO continues.

5. An order granting costs of litigation, including attorneys' fees, incurred in bringing this suit pursuant to 42 U.S.C. § 9659(f).

6. Such other and further relief as the Court deems just and equitable.

DATED July 20, 2004.

SHORT CRESSMAN & BURGESS PLLC

By /s/

Richard A. Du Bey, WSBA No. 8109
Paul J. Dayton, WSBA No. 12619
Connie Sue Martin, WSBA No. 26525
Beth M. Prieve, WSBA No. 34020
Attorneys for Plaintiffs Joseph A. Pakootas and Donald R. Michel

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation, Plaintiffs, v. TECK COMINCO METALS, LTD., a Canadian corporation, Defendant.	NO. CV-04-0256-AAM STATE OF WASHINGTON'S COMPLAINT IN INTERVENTION

I. INTRODUCTION

1.1 The State of Washington seeks to exercise its right under 42 U.S.C. § 9659(g) to intervene as plaintiff in the above-captioned matter on all questions of law and fact brought forth in the original Complaint. This action was brought by the Plaintiffs under the Comprehensive Environ-

mental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, citizen's suit provision, 42 U.S.C. § 9659(a)(1), to enforce the Unilateral Administrative Order for Remedial Investigation/Feasibility Study ("UAO") issued to Teck Cominco Metals, Ltd. ("Teck Cominco"), Docket No. CERCLA 10-2004-0018, on December 11, 2003, by the United States Environmental Protection Agency ("EPA") pursuant to its authority under 42 U.S.C. § 9606(a).

II. PARTIES

2.1 The State of Washington ("State") is a sovereign state of the United States through which the Columbia River flows, including that portion of the River known as Lake Roosevelt. The State has an inherent interest in the health and welfare of it citizens and is a natural resource trustee for the natural resources within the State, including the Columbia River and its associated fish and wildlife.

2.2 Joseph A. Pakootas ("Pakootas") is an enrolled member of the Confederated Tribes of the Colville Reservation ("Tribes"), a sovereign Indian Tribe whose government is recognized by the United States, and a resident of Inchelium, Washington, located within the exterior boundaries of the Colville Reservation.

2.3 Donald R. Michel ("Michel") is an enrolled member of the Tribes and a resident of Inchelium, Washington, located within the exterior boundaries of the Colville Reservation.

2.4 Teck Comino is a Canadian corporation registered as an extra provincial company under the laws of British Columbia. Teck Cominco owns and operates the world's largest integrated lead-zinc smelting and refining complex in Trail, British Columbia, Canada ("Cominco Smelter"), located approximately 10 river miles north of the United States-Canada border ("Border").

III. JURISDICTION AND VENUE

3.1 This Court has jurisdiction of this citizens suit brought to enforce an order which has become effective pursuant to CERCLA, to grant intervention of such parties as are provided by statute and law, and to order such action as may be necessary to correct the violation of the order, and to impose civil penalties. 42 U.S.C. § 9659(c).

3.2 42 U.S.C. § 9659(b)(1) provides for venue in this Court.

IV. FACTUAL ALLEGATIONS

A. The State seeks to intervene on the issues of fact set forth by Plaintiffs.

4.1 The State realleges and incorporates by reference those allegations of fact set forth in Plaintiffs' Complaint which are not unique to the establishment of Plaintiff's standing. Specifically, the State seeks intervention on and realleges the following:

1. Teck Cominco Released Slag Containing Hazardous Substances into the Columbia River.

4.2 From approximately 1906 to mid-1995, Teck Cominco generated and disposed of certain hazardous substances in liquid and solid form, including, but not limited to arsenic, cadmium, copper, mercury, lead, and zinc (hereinafter, "slag") directly into the Columbia River. Prior to mid-1995, the Cominco Smelter discharged up to 145,000 tons of slag each year directly into the Columbia River. The slag generated and disposed of by Teck Cominco into the Columbia River is carried downstream into waters of the United States.

4.3 Over time a significant volume of slag and the hazardous substances contained therein have accumulated and cause continuing impacts to the surface water and ground water, sediments, and biological resources which comprise

the Upper Columbia River and Franklin D. Roosevelt Lake ("Lake Roosevelt").

4.4 The predominant source of slag in the Upper Columbia River and Lake Roosevelt originates from the Cominco Smelter. Evidence shows that the physical and chemical decay of slag, and the subsequent release of trace elements in the form of arsenic, cadmium, copper, zinc, and lead, is an ongoing process in the buried slag and sediment of the Upper Columbia River and Lake Roosevelt.

2. Teck Cominco Slag is Toxic to Humans and to Aquatic Life.

4.5 The contaminants deposited by Teck Cominco into the Columbia River and ultimately Lake Roosevelt are toxic to humans and to aquatic life. As stated in the UAO:

4.5.1 Humans are exposed to slag and contaminated sediment by direct contact with slag on the beaches of the Upper Columbia River and Lake Roosevelt, contact with contaminated sediment during low draw down periods, inhalation of airborne particles, dermal contact, and ingestion. In addition, humans are exposed from ingestion of water from the Upper Columbia River or Lake Roosevelt. and through consumption of fish, aquatic resources, native plants, and agricultural crops.

4.5.2 Environmental effects of slag include both chemical (increased metal loads, potential bioaccumulation, toxicity problems in biota) and physical (scouring of plants and animals in substrates, severe erosion of fish gills, smothering of habitat) components.

3. EPA Issued Teck Cominco a UAO Concerning the Preparation and Performance of a RI/FS at the Upper Columbia River Site.

4.6 On December 11, 2003, EPA issued Teck Cominco the UAO.

4.7 EPA is aware that Teck Cominco has violated and continues to violate CERCLA by failing to fulfill its obligation to comply with the UAO. In particular, EPA is aware, *inter alia*, that Teck Cominco has violated and continues to violate 42 U.S.C. § 9606(a) as follows:

4.7.1 Teck Cominco has failed to comply with the terms and conditions of the December 11, 2003, UAO. Teck Cominco's failure to comply with the UAO constitutes a violation of a condition, requirement, or order which has become effective under CERCLA.

4.7.2 Teck Cominco has failed to provide EPA with notice of its intent to comply with the terms of the UAO within ten days of the effective date of the UAO, in violation of § VII of the UAO. To the contrary, Teck Cominco unequivocally indicated its intent not to comply with the terms of the UAO by its letter dated January 12, 2004, from G. Leonard Manuel directed to Michael F. Gearheard. Teck Cominco's conduct constitutes a violation of a condition, requirement, or order which has become effective under CERCLA.

4.7.3 Teck Cominco has failed to perform the RI/FS and submit deliverables as provided in the Statement of Work, Attachment 1 to the UAO, in violation of § IX(4) of the UAO. Teck Cominco's conduct constitutes a violation of a condition, requirement, or order which has become effective under CERCLA.

4.8 EPA has failed to commence and diligently prosecute an action under CERCLA to require compliance with the UAO.

B. CERCLA grants the State the automatic right to intervene.

4.9 This matter was brought by Plaintiffs pursuant to CERCLA's citizen's suit provision, 42 U.S.C. § 9659(a)(1), to enforce the UAO issued to Defendant. The subject of the UAO, Lake Roosevelt, lies within Washington's borders. Under CERCLA, the Unites States and the State have an ab-

solute statutory right to intervene in any action brought pursuant to the citizen's suit provision. 42 U.S.C.A. § 9659(g). Therefore movant is entitled to intervene as a matter of right.

V. FIRST CLAIM FOR RELIEF: DECLARATORY RELIEF UNDER CERCLA

5.1 The State realleges and incorporates by reference paragraphs 1.1 through 4.9, and seeks intervention on the claims for relief set forth in Plaintiffs' Complaint. Specifically, the State seeks the following relief:

5.2 Teck Cominco has violated and continues to violate CERCLA by failing to fulfill its obligation to comply with the UAO.

5.3 Plaintiffs are entitled to a declaration by this Court that Teck Cominco has violated and continues to violate the UAO and accordingly, has violated and continues to violate CERCLA.

VI. SECOND CLAIM FOR RELIEF: INJUNCTIVE RELIEF UNDER CERCLA

6.1 Teck Cominco has violated and continues to violate CERCLA by failing to fulfill its obligation to comply with the UAO.

6.2 Plaintiffs are entitled to an order enforcing the UAO against Teck Cominco.

6.3 Plaintiffs are entitled to an order requiring such action as may be necessary to correct Teck Cominco's violations of the UAO and accordingly, violations of CERCLA.

VII. PRAYER FOR RELIEF

THEREFORE, having realleged and sought intervention on the foregoing facts and causes of action against Teck Cominco, the State also seeks intervention on the relief prayed for by Plaintiffs. Specifically, the State prays for:

1. A declaration by the Court that Teck Cominco has violated and continues to violate CERCLA.

2. An order enforcing the UAO against Teck Cominco.

3. An order requiring such action as may be necessary to compel Teck Cominco to correct its violations of the UAO and accordingly, its violations of CERCLA.

4. An order requiring the payment of civil penalties to the maximum extent permitted by CERCLA for each day during which the violation of the UAO continues.

5. An order granting costs of litigation, including attorneys' fees, incurred in bringing this suit pursuant to 42 U.S.C. § 9659(f).

6. Such other and further relief as the Court deems just and equitable. DATED this 31st day of August, 2004.

CHRISTINE O. GREGOIRE
Attorney General

s/ Kristie E. Carevich
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APPENDIX J

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

June 2, 2006

Mr. Doug H. Horswill
Senior Vice President
Teck Cominco Metals Ltd
600-200 Burrard Street
Vancouver, B.C. V6C 3L9
Canada

Re: Withdrawal of EPA's Unilateral Administrative Order for Remedial Investigation/Feasibility Study at the Upper Columbia River Site

Dear Mr. Horswill:

Pursuant to Paragraph 70 of the Settlement Agreement for Implementation of Remedial Investigation and Feasibility Study at the Upper Columbia River Site ("Settlement Agreement"), EPA Region 10 is withdrawing the Unilateral Administrative Order for Remedial Investigation/Feasibility Study, Docket No. CERCLA-10-2004-0018, issued to you on December 11, 2003.

Sincerely,
/s/
L. Michael Bogert
Administrator, EPA Region 10

cc: Ann Klee, EPA General Counsel
John Cruden, Deputy Assistant Attorney General
C. Bruce DiLuzio, Teck Cominco American Inc.

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(7)

No. 06-1188

FILED
MAY 0 2 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

TECK COMINCO METALS, LTD.,
a Canadian corporation,

Petitioner,

v.

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; STATE OF WASHINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JOSEPH A. PAKOOTAS AND DONALD R. MICHEL

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SUMMARY OF REASONS TO DENY THE PETITION

The Ninth Circuit decided a narrow question: Whether an action to enforce an EPA order for remediation of hazardous waste that was released into the environment in the United States was a domestic application of law even though the object of the order was a Canadian company. Petitioner Teck Cominco has cited no case or authority that contradicts the court's conclusion on that question. The only argument it offers now—that CERCLA requires a "disposal" of hazardous substances at the same facility from which they were ultimately "released," and that the only "disposal" in this case occurred solely in Canada—was never even considered by the Ninth Circuit because Teck Cominco has never asserted it before, in any court; nor is it supported by any case authority. The thrust of Teck Cominco's Petition—that CERCLA does not apply to it because it commenced its disposal of hazardous waste in Canada—does not answer the Ninth Circuit's analysis or take account of the harm to U.S. territory its mining waste has caused. Because the EPA's order concerns solely domestic conditions, Congress clearly intended CERCLA to apply.

Teck Cominco's alternative argument—that by its terms CERCLA does not apply to generators of hazardous substances who unilaterally dump their waste on another person's property—was also poorly developed below. Teck Cominco did not seek dismissal on this basis in the district court, and cited no authority for its position in the Court of Appeals until just before oral argument, in a letter to the panel. That authority does not conflict with the Ninth Circuit's decision, and no case supports Teck Cominco's position, which would create an illogical and clearly unintended loophole in CERCLA's comprehensive liability scheme.

There is no basis to grant certiorari in this case.

STATEMENT OF THE CASE

For at least 100 years, Teck Cominco and its predecessors have owned and operated an integrated mining, minerals processing, smelting, refining, and metals marketing operation located on the banks of the Columbia River in Trail, British Columbia, just ten river miles north of the Canadian border with Washington State. The Trail smelter is the largest lead smelting facility in the world. For most of its history, through at least the mid-1990s, Teck Cominco disposed of the byproduct of the smelting process, known as "slag," by simply dumping it into the Columbia River. Teck Cominco's "slag" includes many substances considered hazardous to human health and the environment, including arsenic, cadmium, copper, mercury, lead, and zinc. Teck Cominco dumped hundreds of thousands of tons of raw slag into the Columbia every year for approximately 90 years, and that slag flowed south over the border into the United States. Appendix to Petition (Pet. App.) at 72a.

About 15 river miles south of the border, the Columbia River becomes characteristic of a lake or reservoir due to the Grand Coulee Dam, and is known as Franklin D. Roosevelt Lake, or "Lake Roosevelt." Pet. App. at 69a-70a. Spanning approximately 130 miles in length, Lake Roosevelt attracts more than a million recreational visitors per year and comprises a major economic resource for the surrounding area. Pet. App. at 70a. The lake is used for fishing, boating, and swimming and is habitat to a variety of fish, plant, and other aquatic species. *Id.*

Respondents Pakootas and Michel are members of the Confederated Tribes of the Colville Reservation ("Colville Tribes") and live within the exterior boundaries of the reservation, which includes land along the Upper Columbia River. Pet. App. at 70a. They fish and recreate in the Upper Columbia River and Lake Roosevelt, and as members of the Colville Tribes they have expressly reserved hunting, fishing, and gathering rights and entitlements to use the Upper Columbia River and Lake Roosevelt. *Id.* Their use of the River and Lake

are of central importance to their subsistence, culture, and spiritual well-being. Pet. App. at 109a.

After state and federal agencies issued several studies and health advisories concerning the presence of hazardous substances in the Upper Columbia and Lake Roosevelt (the "Site"), the Colville Tribes in August 1999 petitioned the U.S. Environmental Protection Agency ("EPA") to assess the threat of these substances to human health and the environment. Pet. App. at 70a. EPA conducted a site assessment at the Site from October 1999 to March 2003. Pet. App. at 70a-71a. It concluded that the Site contained numerous substances that are known to be hazardous to human health and the environment. Pet. App. at 71a. EPA determined Teck Cominco to be a "responsible person" under CERCLA. The evidence showed with scientific certainty that Teck Cominco was the predominant source of contaminants at the Site. Pet. App. at 72a. EPA considered the contamination sufficiently serious to warrant ranking on the National Priorities List. *Id.* Teck Cominco has cited no Canadian environmental law that applies to the Site, and no entity or government has sought to invoke Canadian law or any treaty to remedy the conditions at the Site.

Based on its site assessment results, EPA determined that Teck Cominco was responsible for the costs of further investigation and remediation at the Site. Pet. App. at 76a. It further found that the presence of Teck Cominco's hazardous waste at the Site constituted actual or threatened releases of hazardous substances into the environment for which it was responsible under CERCLA. *Id.* Teck Cominco's United States subsidiary had extended discussions concerning the required investigation and clean up at the Site. Pet. App. at 73a. After "months of inconclusive discussions and ambiguous commitments" from Teck Cominco and its subsidiary, EPA concluded that Teck Cominco would not voluntarily cooperate, ended the negotiations and, in December 2003, issued a Unilateral Administrative Order ("Order") under CERCLA ordering Teck Cominco to prepare a remedial investigation and

feasibility study ("RI/FS") for the Site. Pet. App. at 73a, 80a-81a; 42 U.S.C. § 9606(a). In issuing the Order, the United States determined that CERCLA applies to Teck Cominco's contamination of the Site.

Teck Cominco refused to comply with the Order. On July 21, 2004, respondents filed suit in the United States District Court for the Eastern District of Washington, seeking declaratory and injunctive relief requiring Teck Cominco to comply with the EPA's Order. Pet. App. at 73a-75a, 105a-112a; *See* 42 U.S.C. § 9659. The State of Washington intervened as of right on the side of respondents. Pet. App. at 113a-119a. Neither the United States nor Canada intervened.

On August 26, 2004, Teck Cominco filed a motion to dismiss, claiming the district court (a) lacked subject matter jurisdiction because CERCLA does not apply to a Canadian polluter; and (b) lacked personal jurisdiction over Teck Cominco. Teck Cominco did not directly challenge application of the "arranger" provision in CERCLA and did not argue, as it does here, that "disposal" must occur at the same "facility" from which there is a "release." After briefing and oral argument, the district court denied Teck Cominco's motion in an order dated November 8, 2004. Pet. App. at 59a.

The district court held that it had personal jurisdiction over Teck Cominco based on the allegations that Teck Cominco's pollution of the Site "is an intentional act aimed at the State of Washington," which "causes harm which defendant knows is likely to be suffered downstream by the State of Washington and those individuals, such as [respondents], who fish and recreate in the Upper Columbia River and Lake Roosevelt." Pet. App. at 31a-35a. Teck Cominco has not challenged this ruling of the district court.

The district court also ruled that it had subject matter jurisdiction and that CERCLA applied because Congress intended that CERCLA provide a means of addressing hazardous waste sites within the United States, and Teck Cominco's hazardous substances created such a site within the United

States. Pet. App. at 37a. It found Teck Cominco could be liable as an "arranger" under CERCLA section 107(a)(3) without having utilized a third party to dispose of its waste. Pet. App. at 47a-50a. Teck Cominco sought and was granted interlocutory review by the United States Court of Appeals for the Ninth Circuit.

The appeal was extensively briefed to the Ninth Circuit with multiple amicus briefs filed on behalf of each side. The United States did not seek leave to file an amicus brief. Again, Teck Cominco never made the argument that "arranger" liability requires disposal at the same facility from which there is a release. Nor did it cite any cases in its brief supporting its assertion that "arranger" liability requires disposal "by [an] other party or entity." Teck Cominco first cited *American Cyanamid Co. v. Capuano*, 381 F.3d 6 (1st Cir. 2004), on which it now relies for evidence of a circuit split on this issue, in a November 22, 2005 letter to the Ninth Circuit – less than two weeks before oral argument.

After oral argument, and just two months before the panel issued its decision affirming the district court, EPA and Teck Cominco entered into a private agreement under which Teck Cominco agreed to a CERCLA-like investigation and feasibility study and EPA agreed to withdraw its Order. Respondents are not party to the agreement. Teck Cominco has not sought any relief in the district court based on that agreement and it advised the Ninth Circuit that the settlement did not moot the case or the appeal. Pet. App. at 9a, n.10.

A panel of the Ninth Circuit issued a unanimous decision on July 3, 2006, affirming the district court. Pet. App. at 1a-28a. The panel held that EPA's Order did not involve extraterritorial application of CERCLA because it concerned a facility located entirely within the United States and a CERCLA release – the leaching of hazardous substances from Teck Cominco's slag – occurred at the Site in the United States. Pet. App. at 15a. In addition, the Ninth Circuit panel reasoned that Teck Cominco could be liable as an "arranger" under

42 U.S.C. § 9607(a)(3), rejecting Teck Cominco's argument that CERCLA requires the involvement of another party. 42 U.S.C. § 9607(a)(3). Pet. App. at 28a.

On July 17, 2006, Teck Cominco filed a petition for panel rehearing and rehearing *en banc*, asserting that the panel decision (a) conflicted with a First Circuit opinion regarding "arranger" liability under CERCLA section 107(a)(3); and (b) raised a question of exceptional importance regarding the application of CERCLA to a foreign corporation. On October 30, 2006, after briefing by respondents, the State of Washington, and amici for both sides, the Ninth Circuit denied Teck Cominco's petition: "The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing *En Banc*." Pet. App. at 61a.

REASONS FOR DENYING THE PETITION

A. The Court of Appeals Correctly Held That an Action to Remedy Domestic Conditions at a Domestic Site Is a Domestic Application of CERCLA.

This case concerns responsibility for the domestic cleanup of a domestic hazardous waste Site. Teck Cominco generated, owned, and disposed of hazardous waste which, in the President's considered judgment, poses a threat to the domestic environment. App. At 75a-76a. Teck Cominco's focus on the "disposal activities" it commenced in Canada misconceives the scope and application of CERCLA. Congress enacted CERCLA to ensure prompt and effective *cleanup* of hazardous waste that threatens human health and the environment, not to regulate *disposal* of such waste. The waste and the cleanup at issue in this case are in the United States, not in Canada. If U.S. law does not govern, no law does. The Ninth Circuit correctly found CERCLA's application in this case was a domestic application of the law. Pet. App. at 22a.

1. EPA's Remediation of a Domestic Waste Site Is a Domestic Application of CERCLA.

CERCLA's two main objectives are to ensure "prompt cleanup" of hazardous waste sites and to "impos[e] all cleanup costs on the responsible party." *Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *quoted in Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). CERCLA's liability regime focuses on the site, or "facility," at which hazardous wastes have "come to be located," not the place where the wastes were originally produced. *See* 42 U.S.C. §§ 9607(a), 9601(9). The statute does not even mention the location from which the hazardous substances originated, because the location of the source is irrelevant to its remediation goal. *See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985) (CERCLA applies "primarily to the cleanup of leaking inactive or abandoned sites and to emergency responses to spills.") (quoting F. Anderson, *et al.*, Environmental Protection: Law and Policy 568 (1984)). Its remedial scheme is not concerned with environmental regulation, but with environmental remediation. *See Meghrig*, 516 U.S. at 483 (contrasting CERCLA's focus on cleaning up waste with RCRA's focus on ongoing and future releases). The sole concern of CERCLA is to hold the responsible parties accountable to clean up the Site at issue. That Site is in the United States.

The fact that Teck Cominco happens to reside in Canada is incidental to the application of CERCLA in this case. Had Teck Cominco sent its hazardous substances across the border by rail or truck and dumped them into the Upper Columbia River Site on the U.S. side of the border, there is no doubt that CERCLA would apply and Teck Cominco would be responsible for the costs of investigation and remediation at the Site. *See, e.g., Canron, Inc. v. Federal Ins. Co.*, 918 P.2d 937, 939 (Wash. App. 1996) (describing case in which CERCLA was applied to Canadian company to recover cleanup costs at property in Washington State to which it had "shipped" its waste products from Canada); *United States v. Ivey*, 747 F. Supp. 1235

(E.D. Mich. 1990) (Canadian former owner of Michigan waste Site liable under CERCLA); *see also United States v. Ivey*, 26 O.R. 533 (Gen. Div. 1995) *aff'd* 30 O.R. 3d 370 (C.A. 1996) (Canadian court enforced U.S. judgment against Canadian actor under CERCLA). Teck Cominco does not deny that application of CERCLA in such a situation is appropriate.[1] Teck Cominco's use of an international waterway to dispose of its wastes in the United States should be treated no differently. The natural and inevitable consequence of Teck Cominco's discharge of hazardous substances into the river in Canada was that they would be released into the environment in the United States. The Ninth Circuit correctly concluded that CERCLA applies to this domestic release.

The Ninth Circuit has confronted a case which *did* call for application of CERCLA to foreign territory, and rejected such application. *Compare Arc Ecology v. U.S. Dep't of the Air Force*, 411 F.3d 1092, 1098 (9th Cir. 2005) (addressing extraterritorial reach of CERCLA in context of case seeking cleanup of former military base located in Philippines). In that case, as party defendant, the United States confirmed the position it has taken in the EPA's Order in this case, Pet. App. at 75a-76a, that when a foreign party releases a hazardous substance across the Canadian border into the United States, as Teck Cominco did here, EPA's imposition of liability under CERCLA "is not an extraterritorial application of CERCLA because EPA is addressing a release into the environment in the United States." Brief of Federal Appellees at 18 n.2, *Arc Ecology v. U.S. Dep't of the Air Force*, 2004 WL 1935956 (9th Cir. 2004) (No. 04-15031).

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1. For this reason, its reliance on *Small v. United States*, 544 U.S. 385 (2005), for the proposition that CERCLA's express application to "any person" who meets the requirements for liability should not be construed to include "foreign persons" is illogical. CERCLA undoubtedly applies to foreign persons who place their hazardous substances in the U.S. environment, and *Small*'s analysis is inapplicable.

2. CERCLA Liability Is Triggered by a Release, not by Disposal.

The Ninth Circuit correctly found that the trigger for application of CERCLA is a "release" (or threatened release) of hazardous substances into the "environment."[2] Pet. App. at 19a-20a; *see also* 42 U.S.C. §§ 9604(a) (authorizing President to take action in response to "release" of hazardous substances into the "environment"); 9606(a) (authorizing President to issue orders or file suit in response to "release" of hazardous substance from a "facility"); 9607(a) (describing persons liable for costs incurred in response to "release" of hazardous substances).

Teck Cominco's contrary contention that CERCLA liability is triggered by certain "conduct" is based on a backwards reading of section 107(a), and is fundamentally inconsistent with CERCLA's sweeping, strict liability scheme. Petition at 15. A party is liable if it falls within one or more of the classes of "covered persons" in section 107(a)(1)-(4). However, liability is not triggered unless there is a "release" at a facility which requires "response costs." *See* 42 U.S.C. § 9607(a); *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1358 (9th Cir. 1990); *see also Dedham Water Co. v. Cumberland Farms Dairy*, 889 F.2d 1146, 1151 (1st Cir. 1989) (section 107(a) describes persons who "may be held liable if there is a release or threatened release of a hazardous substance."); *Containerport Group, Inc. v. Am. Fin. Group, Inc.*, 128 F. Supp. 2d 470, 474 (S.D. Ohio 2001) (CERCLA liability analysis commences with whether a "release" has occurred). Indeed, the mere "disposal" of hazardous substances does not implicate CERCLA at all, until

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2. "Release" is defined broadly to include "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. . . ." 42 U.S.C. § 9601(22). "Environment" is defined to include the water, land, and air within or under the jurisdiction of the United States. 42 U.S.C. § 9601(8). Teck Cominco does not dispute that its hazardous waste has been released, and threatens to continue to be released, into the environment in Washington State.

and unless the hazardous substances are "released" into the "environment," i.e., the water, soil, or air. *See* 42 U.S.C. § 9601(22). Once such a release occurs, the classes of "covered persons" who may be liable is sweeping; liability reaches back to anyone with any relationship or "nexus" to that release. *See New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 105 (3d Cir. 1999); *Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992).

"Conduct" is neither sufficient nor even necessary to impose liability under CERCLA. The first two categories of covered persons listed in section 107(a) include current and former owners of the property where the release occurs, regardless of whether they have engaged in any "conduct" at all. *See, e.g., United States v. Monsanto Co.*, 858 F.2d 160, 168-71 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989) (liability extends to owners regardless of their degree of participation in subsequent disposal of hazardous waste); *Shore Realty Corp.*, 759 F.2d at 1043-44 (Site owner liable even though he did not contribute to presence or cause release of hazardous substances at facility). CERCLA liability is triggered not by any "conduct" with respect to hazardous substances but by the "release" of those substances into the "environment." Teck Cominco does not dispute the latter occurred entirely within the United States.[3]

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3. Teck Cominco's use of the crime of murder to illustrate the importance of "conduct" in imposing CERCLA liability is, ironically, only half wrong. The law prohibiting murder, of course, is the quintessential opposite of a strict liability statute such as CERCLA because it turns solely on state of mind. Thus, while death occurs every day without a murder, the very purpose of CERCLA is to ensure that every hazardous waste Site be cleaned up by a responsible party.

On the other hand, as a jurisdictional matter, the analogy supports the Ninth Circuit's conclusion because, under well-settled jurisdictional principles, an act occurring in one nation (such as a shot fired across a border or slag dumped in a river) which produces harm (such as death or destruction) in another nation subjects the actor to the laws of the latter nation. *See Laker Airways, Ltd. v. Sabena, Belgian World Airlines,*

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3. Petitioner's New Argument on Disposal Was Not Presented to the Courts Below and Is Not Supported by Any Precedent.

In its petition to this Court, Teck Cominco offers a wholly new argument: It contends that, but for a "printer's error," section 107(a)(3) would contain an additional clause at the end, "from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. . . ." *See* Petition at 18-19 (combining portions of 42 U.S.C. §§ 9607(a)(3) & (4)). According to Teck Cominco, this modification "makes absolutely clear" that a person who "disposes" at one facility is not responsible for subsequent "releases" at another facility. Petition at 19.

Absolute clarity is an attribute rarely, if ever, given to the language of CERCLA in general, or section 107(a)(3) in particular. *See United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 n.5 (3d Cir. 1992) (CERCLA is "riddled with inconsistencies and redundancies"); *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1451 (E.D. Cal. 1995) (definition of "arranger" is "inartful"). Moreover, the interpretation Teck Cominco advances has never been adopted by any court, ever. Indeed, this interpretation, which Teck Cominco now says is "indisputably compel[ed]" by the statutory language, is one that *it did not even think of* until it reached this Court. Petition at 18. Teck Cominco did not advance this argument in the district court, or in the Court of Appeals, or in its petition for rehearing *en banc*. Teck Cominco now states the Ninth Circuit "badly misapprehend[ed] the statutory text" for

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731 F.2d 909, 922 (D.C. Cir. 1984) (conduct outside the territorial boundary which has or is intended to have a substantial effect within the territory subject to jurisdiction of the territory); *Restatement (Second) of Foreign Relations Law* § 18, cmt. c, illus. 2 (1965) (a person taking action in State B which causes a homicide in State A becomes subject to prosecution under the jurisdiction and laws of State A).

failing to adopt this new interpretation, yet it failed to even argue this interpretation in that court.

Teck Cominco's new argument depends on another proposition, also never raised in any court below (and barely mentioned in its petition to this Court): that its "disposal" of hazardous waste occurred exclusively in Canada, even though it dumped the waste into a river, *knowing* it would be carried into the Upper Columbia River Site in the United States. Petition at 20 n.4.

In Teck Cominco's view, its disposal ended when its slag splashed into the river, not when it came to rest downstream in the United States. Yet, "disposal" under CERCLA is not a discrete, isolated event that can be severed from the ultimate repose of the substances concerned. *See, e.g., Kaiser Aluminum & Chem. Corp. v. Catellus Development Corp.*, 976 F.2d 1338, 1342 (9th Cir. 1992) ("the term 'disposal' should not be limited solely to the initial introduction of hazardous substances onto property") (citing *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988)). If it were, then a person standing in his own yard who rolled barrels of hazardous waste down a hill into his neighbor's yard would have "disposed" of it only in his yard, and he would bear no responsibility for it under CERCLA.[4]

In support of its position, Teck Cominco cites no cases on point; its cases held only that so-called "innocent owners"—people who were not even aware that there was hazardous waste on their property—cannot be held liable under CERCLA based merely on "the gradual passive migration of contamination

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4. *Compare, e.g., Dent v. Beazer Materials and Servs., Inc.*, 993 F. Supp. 923, 929, 946 (D.S.C. 1995), *aff'd*, 133 F.3d 914 (4th Cir. 1998) (defendant who dumped chemicals on his own property, which drained onto neighbor's, liable under CERCLA); *In re Hemingway Transp., Inc.*, 993 F.2d 915, 931 (1st Cir. 1994), *cert. denied, Kahn v. Juniper Dev. Grp.*, 510 U.S. 914 (1993) (neighboring landowner may assert right of action against PRP for response costs incurred from migration of hazardous substances from adjoining property).

through the soil." *Carson Harbor Village, Ltd., v. Unocal Corp.*, 270 F.3d 863, 879 (9th Cir. 2001) (*en banc*).[5] As the Third Circuit explained in *CDMG Realty*, holding such innocent owners liable would be inconsistent with CERCLA's purpose to hold "polluters" responsible for the costs of remediation:

> Those who owned previously contaminated property where waste spread without their aid cannot reasonably be characterized as "polluters"; excluding them from liability will not let those who cause pollution off the hook.

96 F.3d at 717.

By contrast, this case involves neither an "innocent owner" nor a "passive disposal"; Teck Cominco actively dumped millions of tons of raw contaminants into a moving river, and that act of "disposal" continued until the contaminants came to rest in the Upper Columbia River, in the United States.[6] The

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5. *See also United States v. 150 Acres of Land*, 204 F.3d 698, 705 (6th Cir. 2000); *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 358 n.3 (2d Cir. 1997); *United States v. CDMG Realty Co.*, 96 F.3d 706, 722 (3d Cir. 1996). Contrary to Teck Cominco's assertion, its cases recognized that "disposal" may include "passive" movement of contamination; they merely found passive soil migration did not constitute "disposal." *See Carson Harbor*, 270 F.3d 863, 879, 881 (rejecting the "binary 'active/passive' distinction" and concluding that "disposal" may include passive migration); *ABB Indus. Sys.*, 120 F.3d at 358 n.3 (holding that passive soil migration is not a disposal; "we express no opinion" whether leaking barrels could constitute passive "disposal"); *CDMG Realty Co.*, 96 F.3d at 714 (observing that "leaking" and "spilling" could constitute "disposal" without affirmative human conduct). Many courts have concluded, in other circumstances, that "passive" movement of hazardous substances may constitute a "disposal" under CERCLA. *See, e.g., Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845 (4th Cir. 1992) (leaking storage tanks constitute "disposal"); *see also CDMG Realty*, 96 F.3d at 713 (citing additional cases).

6. Contrary to Teck Cominco's assertions, Petition at 19-20, the EPA's findings support the conclusion that Teck Cominco "disposed" (Cont'd)

district court recognized this when, in its analysis of personal jurisdiction, it concluded that plaintiffs had adequately alleged that Teck Cominco's disposal was "an intentional act expressly aimed at the State of Washington." Pet. App. at 34a.

B. The Ninth Circuit's Application of United States Law to This Domestic Condition Does Not Raise Any Comity Concerns.

The principle of international comity is not violated unless application of CERCLA to Teck Cominco makes it impossible for Teck Cominco to comply with United States and Canadian law. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993) (quoting *Restatement (Third) of Foreign Relations Law of the United States*, § 415, *cmt. e* (1987) (hereinafter Restatement (Third) of Foreign Relations Law); *see*, *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 555 (1987) (comity concern not raised unless there is "a true conflict between domestic and foreign law"). This Court has explained that application of U.S. law to foreign conduct causing domestic injury does not violate comity principles. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004). Having failed to explain how remediation of its hazardous substances in the United States will impair its compliance with Canadian law, Teck Cominco has not established any comity concern.[7]

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of its waste "into" the facility in the United States: EPA found Teck Cominco had "*arranged for disposal* of its hazardous substances from the Trail Smelter *into* the Upper Columbia River *by* directly *discharging* up to 145,000 tonnes of slag annually." Pet. App. 72a.

7. Although Teck Cominco identifies no clash between United States and Canadian law, it does not claim that it has complied with Canadian law. That claim is not based on any evidence in the record. Indeed, the only evidence regarding Canadian law in the record was submitted by the State of Washington through the Declaration of Richard Kyle Paisley, a professor of law at the University of British Columbia. In a Declaration filed in the Court of Appeals he explained that there is
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Teck Cominco suggests that comity concerns are implicated because the government of Canada has opposed application of CERCLA in an amicus brief filed in the Ninth Circuit.[8] Canada's objection, that it prefers negotiation over litigation, is even less compelling than the British government's unsuccessful objection in *Hartford*. There, this Court applied the Sherman Act, 15 U.S.C. § 1, to British insurance companies based on foreign conduct that had effects in the United States, even though the British government objected that the private lawsuit interfered with its comprehensive regulatory scheme permitting such practices. That the insurers' conduct was consistent with British law and policy was not enough to state a conflict. 509 U.S. at 799. "No conflict exists, for these purposes, 'where a person subject to regulation by two states can comply with the laws of both.'" *Id.* (quoting *Restatement (Third) of Foreign Relations Law* § 403, *cmt. e*); *see also Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 921-26, 931-45 (D.C. Cir. 1984).

The government of Canada expressed interest in "preserving from interference, by private litigation in U.S. courts, its sovereign right to regulate Canadian persons and companies operating in Canada." Petition at 13. "Private litigation" is a misnomer because this lawsuit is based on an order issued by

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no clash between United States and Canadian law and that Canadian law does not provide for remediation of any site located in the United States.

8. Teck Cominco also cites and relies upon a diplomatic note which the district court struck from the record on Respondents' Motion. Teck Cominco has not appealed the district court's order, nor explained why it may now cite this document. EPA may not, as Teck Cominco urges here, decline to apply CERCLA out of concern that the Canadian government may not support the United States' military efforts in Afghanistan. Petition at 22. This Court has clearly stated that "[i]n particular, while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws." *Massachusetts v. EPA*, ___U.S. ___, 127 S. Ct. 1438, 1463 (2007).

the United States government that CERCLA applies to Teck Cominco. That order reflects the President's judgment that comity concerns should not prevent application of CERCLA to this domestic site, and answers any comity concern here. *See Pravin Banker Assocs. Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 855 (2d Cir. 1997) ("extending comity to Peru's debt negotiations is only appropriate if it is consistent with United States government policy"). It is not for this court to second guess the Executive's decision. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). The President is best suited to make the comity judgment and this Court should defer to it.

Despite the fact that only U.S. law applies to remediate this site in the United States, Teck Cominco suggests that CERCLA should not be applied because there are "bilateral mechanisms" for resolving trans-boundary environmental issues, principally the Boundary Waters Treaty of 1909 ("BWT"). This argument is not based on any principled analysis of abstention, or other ground to decline to exercise jurisdiction. *Turner Entn't Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1521-1523 (11th Cir. 1994) (discussing the standards for deference to a foreign proceeding). The BWT does not create a binding or exclusive dispute resolution mechanism. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 494, 500-01 (1971) (holding State of Ohio could sue Canadian company under state common law for dumping mercury into streams which flowed across the border into Lake Erie, despite the existence of a related proceeding under the BWT), *rev'd by implication on other grounds, see Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *see also id.* at 506-07 (Douglas, J., dissenting on other grounds) (BWT "does not evince a purpose on the part of the national governments of the United States and Canada to exclude their States and Provinces from seeking other remedies for water pollution").[9] The BWT provides a non-binding, consensual

9. During negotiation of the BWT, the United States specifically (Cont'd)

procedure by which the U.S. and Canadian governments can submit certain trans-boundary water disputes to arbitration. Neither government has attempted to commence such a process regarding the Site at issue here, and the BWT is literally beside the point.

C. Application of United States Law to Remedy Domestic Conditions Does Not Implicate the Presumption Against Extraterritorial Enforcement of U.S. Law.

Teck Cominco relies heavily on the presumption against extraterritorial application of U.S. law. This rule of statutory construction is a useful guide when applying U.S. regulatory laws to foreign conditions.[10] In a case in which a plaintiff sought to apply U.S. labor law to work place conditions in Saudi Arabia, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (*ARAMCO*), this Court explained that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." 499 U.S. at 248 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). Teck Cominco concedes that the "presumption against extraterritoriality flows naturally from the 'commonsense notion that Congress generally legislates with domestic concerns in mind.'" Petition at 12 (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)). Teck Cominco's Rule 12(b)(6)[11] motion

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rejected the idea of vesting exclusive jurisdiction over trans-boundary water pollution disputes in an international tribunal. *See F.J.E. Jordan, Great Lakes Pollution: A Framework for Action*, 5 Ottawa L. Rev. 65, 67 (1971-72).

10. The presumption against extraterritoriality is a canon of construction "whereby unexpressed congressional intent may be ascertained." *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). As with any interpretive tool, it is not applicable "where it is not a reliable guide to congressional intent." *United States v. Corey*, 232 F.3d 1166, 1170-71 (9th Cir. 2000).

11. Teck Cominco's motion also challenged subject matter jurisdiction. As the district court recognized, Pet. App. 31a, it had subject
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presented the question of whether Congress intended to apply CERCLA to this domestic site and the parties responsible for the hazardous substances released there. Nothing about such application of U.S. law raises the concerns underlying the presumption against extraterritorial application of law.

Teck Cominco argues that the extraterritorial presumption reflects Congressional intent in CERCLA because application of CERCLA here will result in a clash of law between the United States and that of another sovereign, which Congress generally seeks to avoid. Petition at 12-13. *See ARAMCO*, 499 U.S. at 248. No clash of law is alleged here, though. Teck Cominco has alleged only Canada's interest in regulating its citizens, and no clash regarding laws applicable to remediation of this Site.[12] This is no clash at all because U.S. law is not being applied to regulate Teck Cominco's Canadian operations or to remediate conditions at a Canadian site. *See Empagran*, 542 U.S. at 165, (application of U.S. antitrust laws to redress domestic antitrust injury caused by foreign conduct is reasonable even though it conflicts with foreign nation's regulation of its commercial affairs).[13]

Teck Cominco's claim that the extraterritoriality presumption is implicated is ultimately grounded in its allegation that its disposal of hazardous substances occurred exclusively in Canada and Congress did not intend CERCLA to reach such

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matter jurisdiction pursuant to 42 U.S.C. § 9613(b) and § 9659 (c). Teck Cominco's motion challenging application of CERCLA to its conduct is analyzed under Fed. R. Civ. P. 12(b)(6). *See Hartford Fire Ins.* 509 U.S. at 813. (J. Scalia dissenting.)

12. Teck Cominco fails to cite any Canadian law whatsoever. *See* Petition at 13. The record shows there is no conflict between Canadian law and U.S. law on this point. Declaration of Professor Richard Kyle Paisley.

13. *Compare Microsoft Corp. v. AT&T Corp.*, 550 U.S. __, No. 05-1056, slip op. at 16 (Apr. 30, 2007) (Foreign law governs rights in inventions manufactured and soled solely in foreign countries).

conduct even when it causes substantial harm in the United States.[14] Teck Cominco's argument on this point relied substantially on *American Banana Company v. United Fruit Company*, 213 U.S. 347, 356 (1909), which it cites for the proposition that U.S. courts should refrain from applying U.S. law to foreign acts. Petition at 12-13. Such reliance is misguided because to the extent that *American Banana* has been read to reject application of U.S. law to foreign conduct causing domestic injury, as Teck Cominco alleges, it has been repudiated. *Hartford Fire Ins.*, 509 U.S. at 796. This Court has embraced effects-based application of U.S. law to foreign conduct causing injury in the United States. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 287 (1952).[15]

Whether the conduct in question is a murder in which the bullet is shot across the border or an antitrust conspiracy conducted in Canada but causing injury in the United States, United States laws are reasonably applied to the conduct causing domestic injury.[16] *Empagran*, 542 U.S. at 164-65; *see also Hartford Fire Ins.*, 509 U.S. at 796; *Laker Airways*, 731 F.2d at 922. ("It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory"). *See also United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-444 (2d Cir. 1945). This is not

14. Teck Cominco's claim that it acted exclusively in Canada is not supported by any authority or reason, see pp. 11-14, *supra*.

15. Although the proposition was perhaps not always free from doubt, *see American Banana Company v. United Fruit Company*, 213 U.S. 347 (1909), it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial affect in the United States.

Hartford Fire Ins. Co., 509 U.S. at 795.

16. Rudimentary principles of personal jurisdiction indicate that Teck Cominco's purposeful conduct directed toward U.S. territory gave the U.S. courts jurisdiction over its conduct. *See* District Court opinion, Pet. App., 31a-32a.

an extraterritorial assertion of jurisdiction, because such jurisdiction is premised on the effects that occurred within U.S. territory. *Laker Airways*, 731 F.2d at 923.

Many courts have found the extraterritorial presumption unhelpful or inapplicable when examining application of U.S. law to remedy domestic injury or injury to lands over which the U.S. has territorial sovereignty. *See United States v. Corey*, 232 F.3d 1166, 1170 (9th Cir. 2000). The Courts of Appeal have consistently noted that the presumption is not applicable when the conduct in question is "intended to, and results in, substantial effects within the United States." *In re Simon*, 153 F.3d 991, 995 (9th Cir. 1998) (quoting *Laker Airways*, 731 F.2d at 925); *see also Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 533 (D.C. Cir. 1993); *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103, 1108 (7th Cir. 1984); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968). This is because in cases involving substantial domestic injury, there is little or no reason to believe Congress intended to exclude foreign actors from liability. The district court cited the Seventh Circuit's reasoning in *Tamari* on this principle:

> Reliance on [on the extraterritoriality] presumption is misplaced, however, when the conduct under scrutiny has not occurred wholly outside the United States, or when conduct outside the United States could otherwise affect domestic conditions. In these cases, courts have looked at this nature of the conduct or effects in the United States to determine whether extraterritorial application would be consistent with the purposes underlying the statute.

Tamari, 730 F.2d at 1108 (citation omitted).

Application of CERCLA to a foreign polluter whose hazardous substances are released in a domestic site is indisputably necessary to accomplish the purposes of CERCLA: Remediation of hazardous substances which have been released in the domestic environment. *Arc Ecology v. U.S. Dep't of the Air Force*, 411 F.3d at 1094 (CERCLA's primary objectives are

"to ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances [bear] the cost of remedying the conditions they created." (citation omitted). *See Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994) ("CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites"). The breadth of the U.S. focus of CERCLA is expressed in 42 U.S.C § 9601(8) (defining "environment to include all land, air and water within the United States or under its jurisdiction"). If CERCLA cannot reach the hazardous substances found in this Site, Congress' objectives in passing CERCLA cannot be accomplished.

Teck Cominco ignores the above-cited authority and focuses on one case, *Steele v. Bulova*, which it attempts to distinguish by noting that it involved some domestic conduct. Teck Cominco's discharges into the territorial U.S. are at least as substantial as the domestic acts in *Steele*, so this argument gains Teck Cominco nothing. More fundamentally, the Court's reasoning in *Steele* was based on "[u]nlawful domestic effects" and the purposes of the statute; the same considerations suggest application of U.S. law here. 344 U.S. at 288.

In its recent decision in *Spector v. Norwegian Cruise Line, Ltd.*, 545 U.S. 119 (2005), the Court similarly focused on territorial injury in determining whether a "clear statement" was necessary to permit application of U.S. law to actions on foreign flag ships in U.S. territorial waters. Its formulation distinguishes between statutes of general application and those targeting domestic concerns, for which application of U.S. law is self-evident:

> Our cases hold that a clear statement of congressional intent is necessary before a general statutory requirement can interfere with matters that concern a foreign-flag vessel's internal affairs and operations, *as contrasted with statutory requirements that*

> *concern the security and well-being of United States citizens or territory.*

545 U.S. at 125 (emphasis added). Thus, a "clear statement" of legislative intent is not necessary for application of U.S. law to matters aboard a foreign flag vessel that affect the peace and tranquility of the U.S. Such matters have never "by comity or usage been entitled to any exemption from the operation of the local laws." *Id.* at 130 (quoting *Wildenhus's Case*, 120 U.S. 1, 12 (1887)).

This approach to assessment of Congressional intent applies with equal force here. This Court has never held that U.S. law does not apply to foreign conduct causing domestic harm, and Teck Cominco does not attempt to cite such a case. This is because the clash of law and interference with sovereignty that is presented when U.S. law is applied to foreign actions with exclusively foreign impact is not presented when U.S. law is applied to remedy a domestic condition and such application is consistent with Congress' presumed focus on domestic conditions.

Teck Cominco cites *Hartford Fire Ins.* and *Murray v. Schooner The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), for the proposition that American statutes should not be read as transgressing the law of nations. Teck Cominco does not explain, however, what law of nations is violated by application of CERCLA to this domestic condition. The effects-based application alleged here is well grounded in international law. As stated in the *Restatement (Third) of Foreign Relations Law*, "a state has jurisdiction to prescribe law with respect to . . . conduct outside of its territory that has or is intended to have substantial effect within its territory, so long as such exercise is reasonable." *Restatement (Third) of Foreign Relations Law* §§ 402, 403; *see Empagran*, 542 U.S. at 165. Teck Cominco has not attempted to rebut this proposition. Nor has it cited any

law in Canada, provincial or federal, which is inconsistent with CERCLA's application in this case.[17]

Instead, Teck Cominco complains that EPA's application of CERCLA to this domestic condition would "wreck the elegant bilateralism that has distinguished U.S.-Canadian environmental relations for the past century" and usurp the foreign-relations powers of the political branches. Petition at 21. The existence of treaties and other agreements between Canada and the United States does not demonstrate conflict with principles of international law. Nor can Teck Cominco seriously argue that EPA, acting for the President, interfered in the President's foreign relations power by issuing the Unilateral Order in this case. Respondents' suit based on that order is grounded in the same authority.

D. Teck Cominco's Argument On Arranger Liability Is Not Ripe For Supreme Court Review.

Teck Cominco claims the Ninth Circuit's decision creates a "direct conflict of federal appellate authority in one of CERCLA's core liability provisions"—arranger liability under § 107(a)(3), 42 U.S.C. § 9607(a)(3). Petition at 25. Teck Cominco contends that "arranger" liability requires concerted action with an "other party or entity," and does not reach polluters who dispose of their own waste themselves.

Teck Cominco's district court motion mentioned arranger liability as it pertained to the question of whether CERCLA

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17. This case is almost as paradigmatic of effects-based jurisdiction as the trans-boundary homicide. *See Laker Airways*, 731 F.2d at 922. Indeed, the Restatement provides the following prescient example:

> X operates a refinery in state A near the border of state B that emits fumes generally known to be injurious to plant life. The fumes pollute the air in B, and Y's trees in B stop bearing fruit as a result. B has jurisdiction to prescribe a civil remedy for damages.

Restatement (Second) of Foreign Relations Law § 18, *cmt. g*, ex. 6 (1965).

applied extraterritorially, but cited no case authority explaining its application. Teck Cominco's appeal to the Ninth Circuit also focused on the extraterritoriality question. Its petition for permission to appeal under 28 U.S.C. § 1292(b) said: "the issue presented is whether the district court erred in holding that Congress intended to allow CERCLA to be applied to conduct in foreign countries." Appellant's Opening Brief in the Ninth Circuit described the issue presented for review as follows: "the issue presented is whether the district court erred in holding that Congress intended to allow CERCLA to be applied to conduct in foreign countries."

Teck Cominco's Ninth Circuit brief mentioned arranger liability as part of its argument that CERCLA was being improperly applied extraterritorially, but again it cited no cases supporting its position and did not suggest that failure to allege the elements of arranger liability required reversal. Teck Cominco first mentioned the *American Cyanamid Co. v. Capuano*, 381 F.3d 6, 23-25 (1st Cir. 2004) case, based on which it now claims a circuit split, in a letter to the Ninth Circuit panel, less than two weeks before oral argument. Even then, Teck Cominco provided only one sentence describing the significance of the case and no analysis of the Ninth Circuit's decision in *Cadillac Fairview/California, Inc. v. United States*, 41 F.3d 562, 565 (9th Cir. 1994).

E. The Court of Appeals' Decision Creates No Circuit Split.

The Ninth Circuit's decision did not create a conflict among federal courts on CERCLA's definition of "arranger." Teck Cominco argues that a person who disposes of hazardous substances on someone else's property, without the aid of a third party, cannot be liable as an "arranger" under CERCLA section 107(a)(3), 42 U.S.C. § 9607(a)(3). The Court of Appeals rejected this novel argument, and there is no case that holds to the contrary.[18]

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18. *But see Kaiser Aluminum & Chem. Corp. v. Catellus Dev.*, (Cont'd)

Teck Cominco attempts to conjure a "conflict" by citing cases that addressed an entirely different question—whether a person must have "owned or possessed" the hazardous substances in order to be potentially liable as an "arranger." *See American Cyanamid*, 381 F.3d at 24-25 (holding that a "broker" of hazardous substances was liable on the theory of "constructive possession"). The Circuits that have addressed *that* question, including the Ninth, are in general agreement, albeit by employing different analyses to varying factual situations. For example, the Sixth Circuit, like the First, has held that a party may be liable as an "arranger" if it exercised control over hazardous waste, even if it did not actually own or physically possess it. *GenCorp, Inc., v. Olin Corp.*, 390 F.3d 433, 449 (6th Cir. 2004). The Eighth and Ninth Circuits are in accord. *See United States v. Shell Oil Co.*, 294 F.3d 1045, 1055 (9th Cir. 2002) (control of the process that produces hazardous substances is crucial in determining whether a party is an "arranger"); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986) ("*NEPACCO*") ("We believe requiring proof of personal ownership or actual physical possession of hazardous substances as a precondition for liability under CERCLA § 107(a)(3) . . . would be inconsistent with the broad remedial purposes of CERCLA"). The Third Circuit has indicated that "arranger" liability requires proof of ownership or possession and knowledge or control of the

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(Cont'd)

976 F.2d 1338, 1341 (9th Cir. 1992). There, the court found the defendant could be liable under CERCLA both as a "former operator" and as a "transporter." The plaintiff had not even alleged that the defendant could be held liable as an arranger, but the court offhandedly stated: "Nor has [plaintiff] alleged that Ferry arranged for the contaminated soil to be disposed of 'by any other party or entity' under 9607(a)(3). Ferry disposed of the soil itself by spreading it over the uncontaminated areas of the property." *Id.* The panel in this case unanimously agreed that this comment was "offhand, unreasoned, and ambiguous" and did not state the law on "arranger" liability. Pet. App. at 28a.

hazardous substances. *Morton Int'l, Inc., v. A. E. Staley Mfg. Co.*, 343 F.3d 669, 677 (3d Cir. 2003) (discussing various cases and concluding that the circuits are "virtually unanimous" on broad principles for arranger liability but disagree about specific factors).

Only one of these courts even *mentioned* the phrase in section 107(a)(3) upon which Teck Cominco's argument in this case depends, "any other party or entity," and that mention is clearly a *dictum*. In *American Cyanamid*, the defendants had brokered the disposal of the plaintiff's hazardous waste on the property of a third person, and the plaintiff sued for a contribution to the remediation costs under CERCLA. 381 F.3d at 10. Following a bench trial in which the district court found the brokers liable under three of CERCLA's four categories of responsible parties—as "operators," "transporters," and "arrangers"—the brokers appealed, and the First Circuit affirmed. *See id.* at 21-24. First, the court held that the brokers were "transporters" under section 107(a)(4) because they actively participated in deciding where the waste would be dumped. *Id.* at 22. Second, the court held that the brokers were liable as "operators" under section 107(a)(2) because they "developed the idea for using the Site, prepared the Site for dumping, arranged for waste to be dumped at the Site, showed the transporters where to dump on the Site, and collected payment and transmitted a share to" the owner of the Site. *Id.* at 23. Finally, the court held the brokers were liable as "arrangers" under section 107(a)(3) because they exercised control over the waste, such that they "constructively possessed" it. *Id.* at 25. The court remarked that the clause in section 107(a)(3) "'by any other party or entity' clarifies that, for arranger liability to attach, the disposal or treatment must be performed by another party or entity, as was the case here." *Id.* at 24. This statement was not necessary to the

court's holding and did not affect the outcome of the case.[19] Teck Cominco has cited no case that decided the question the Ninth Circuit decided here, whether a person who disposes of its own waste on the property of another must have utilized another party or entity in order to be liable as an arranger.[20]

As the Ninth Circuit noted below, no effort to assign the phrase, "by any other party or entity" in section 107(a)(3) is entirely satisfactory. Pet. App. at 24a. If, for example, the Court were to accept Teck Cominco's position, then the second, disjunctive clause of the section serves no purpose. That clause provides two categories of potentially liable persons: those who "arranged for disposal or treatment" and those who "arranged with a transporter for disposal or treatment." 42 U.S.C. § 9607(a)(3).[21] In Teck Cominco's

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19. The offhanded nature of the First Circuit's treatment of the phrase "by any other party or entity" may explain why Teck Cominco did not even think to cite *American Cyanamid* to the Court of Appeals until two weeks before oral argument.

20. Respondents cited cases in which owners or generators of hazardous substances disposed of their own hazardous substances on someone else's property and the courts held them liable as arrangers. *See, e.g., Nat'l R.R. Passenger Corp. v. New York City Hous. Auth.*, 819 F. Supp. 1271, 1277 (S.D.N.Y. 1993) (natural flaking of substances from railroad tunnel onto tracks constitutes "arrangement for disposal"); *State of Colorado v. Idarado Mining Co.*, 707 F. Supp. 1227, 1241, *amended by* 735 F. Supp. 368 (D. Colo.), *rev'd on other grounds*, 916 F.2d 1486 (10th Cir. 1990) (defendant "arranged" for disposal of mine tailings by dumping them into river, which brought them downstream to a "facility").

21. Section 107(a)(3) reads, with emphasis added, as follows:

> any person who by contract, agreement, or otherwise **arranged for disposal or treatment,** *or* **arranged with a transporter for disposal or treatment**, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances. . . .

analysis, the latter group is necessarily embraced in the former because an "arrangement" with a transporter would always constitute an "arrangement" with an "other party or entity." Why would Congress need to impose liability on *both* those who "arranged for disposal or treatment" and those who "arranged with a transporter for disposal or treatment" if *no* arranger was liable unless he involved an "other party or entity"?

Ultimately, the Ninth Circuit correctly recognized that Teck Cominco's reading of arranger liability would produce "a gaping and illogical hole" in CERCLA's coverage, Pet. App. at 26a, which Congress could not have intended and no court has ever adopted: That a person who knowingly, intentionally, and actively disposed of his own hazardous substances onto the property of another would not be responsible for those substances under the federal cleanup statute.[22] The so-called "midnight dumper" was expressly targeted by the drafters of CERCLA. *See* Michael Robinson-Dorn, *Trail Smelter: Is the Past Prologue? EPA Blazes a New Trail for CERCLA*, 14 N.Y.U. Envtl. L.J. 2, 51-52 & n. 275 (2005) (quoting legislative history expressing "Congress's well known and oft-expressed concern" with "midnight dumpers" who dispose of hazardous substances on the property of others). Congress could not have intended to exclude such polluters from CERCLA's reach.

Not only has no case so held, but the cases upon which Teck Cominco relies for its position strenuously resisted similarly restrictive interpretations. The First Circuit in *American Cyanamid*, for example, embraced the concept of "constructive possession" of hazardous substances in order to *avoid* "a loophole through which brokers and middlemen could escape liability." 381 F.3d at 25; *see also Gencorp*,

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22. None of the other categories of responsible persons—owner/operators of facilities, former owner/operators of facilities, and transporters—would apply. 42 U.S.C. § 9607(a).

390 F.3d at 448-49 (same, citing other cases). The cases cited by Teck Cominco as evidence of a circuit "split" over the meaning of "arranger" embraced a broad reading of section 107(a)(3). *See, e.g., Morton Int'l*, 343 F.3d at 676; *United States v. Vertac Chem. Corp.*, 46 F.3d 803, 810 (8th Cir. 1995) (quoting *NEPACCO*, 810 F.2d at 743). The interpretation Teck Cominco seeks, by contrast, would *narrow* CERCLA's coverage and give immunity to a group of plainly culpable polluters whom Congress clearly meant to reach.

To the extent that the lower appellate courts have analyzed the substance of "arranger" liability under CERCLA, they are generally in agreement. The Ninth Circuit's holding in this case that a party can be an arranger by disposing of its own waste on the property of another does not conflict with the holding of any other Circuit. It is not an issue deserving of certiorari.

CONCLUSION

This case does not meet the standard for certiorari. Teck Cominco has not shown a true conflict between the Circuits, much less a conflict concerning "an important matter" that should be reviewed by this Court in this case. S. Ct. Rule 10(a). A conflict that is merely "academic or [] episodic" is insufficient to justify certiorari. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). The Court often denies review in cases in which there is some acknowledged conflict over an issue of insufficient importance or has been insufficiently developed for a full and considered decision by this Court. *See, e.g., Beaulieu v. United States*, 497 U.S. 1038 (1990) (noting 56 petitions denied in 1989 term despite conflicts with other courts). As Justice Stevens has observed, the Court often serves its role best by waiting for a conflict to ripen in the lower courts before accepting review of the issue. "[E]xperience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally

resolved and thus may play a constructive role in the lawmaking process." Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982). The issues Teck Cominco raises are not ripe for Supreme Court review.

For the foregoing reasons, the Petition for writ of certiorari should be denied.

Respectfully submitted,

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NO. 06-1188

IN THE SUPREME COURT OF THE UNITED STATES

TECK COMINCO METALS, LTD.,

Petitioners,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, AND THE STATE OF WASHINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATE OF WASHINGTON IN OPPOSITION

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JURISDICTION

The court of appeals opinion was entered July 3, 2006. A petition for panel rehearing and rehearing en banc was denied October 30, 2006. On January 12, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 27, 2007, and the petition was filed February 27, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Factual Background[1]

Congress enacted the Comprehensive Environmental Response, Compensation And Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675, "in response to the serious environmental and health risks posed by industrial pollution." *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA "grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic*

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[1] This case is in a preliminary procedural posture; its facts are therefore limited. The court below affirmed the district court's denial of Petitioner Teck Cominco Metals, Ltd.'s Rule 12(b)(6) motion to dismiss. Thus, the only facts before the Court are the well-pleaded allegations in Respondents' complaints, which the court must assume to be true. *Berkovitz v. United States*, 486 U.S. 531, 540 (1988). We address Teck's assertion of "facts" not properly before the Court in this Statement, and in responding to Teck's arguments that go beyond the preliminary record.

Corp. v. United States, 511 U.S. 809, 814 (1994). It both provides a mechanism for cleaning up hazardous waste sites and requires that such cleanups be paid for by those responsible for the contamination. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989), *overruled on other grounds, Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Indeed, "[t]he remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous waste contamination may be forced to contribute to the costs of cleanup." *Bestfoods*, 524 U.S. at 56 n.1 (quoting *Union Gas Co.*, 491 U.S. at 21) (emphasis added).

CERCLA provides the President, acting through the Environmental Protection Agency (EPA),[2] with several alternatives for cleaning up contaminated sites. CERCLA § 106(a) gives the President authority to respond to releases of hazardous substances that "may be an imminent and substantial endangerment" to the environment by "issuing such orders as may be necessary" to liable parties directing them to clean up the site. 42 U.S.C. § 9606(a).

Petitioner Teck Cominco Metals, Ltd. (Teck) owns and operates the world's largest integrated lead/zinc smelter, in Trail, British Columbia on the banks of the Columbia River (the Trail Smelter). Pet. App. 4a–5a. Trail is just ten miles north of the border between the United States and Canada. Pet. App. 72a. Teck has operated the Trail Smelter for over 100 years, and for the majority of that time, Teck discharged both the solid and the liquid byproducts of its smelting operations (collectively known as slag) directly into the free-flowing

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[2] CERCLA grants authority to the President, who has delegated various powers to the EPA. *See* Exec. Order No. 12,580, 3 C.F.R. 193 (1988).

Columbia River.[3] Pet. App. 72a. The slag flowed with the river across the border, where it came to rest in the beds and banks of the Upper Columbia River and Lake Roosevelt in the United States.[4] Pet. App. 72a. Teck discharged 160,000 tons of slag annually (more than 13 million tons total) into the Columbia River from the turn of the century until 1995, when it ceased such discharges. Pet. App. 5a n.6.

The slag contains heavy metals, including arsenic, cadmium, copper, mercury, lead, and zinc, as well as other unspecified hazardous substances. Pet. App. 72a ¶ 12. A significant amount of slag accumulated in the Upper Columbia River and Lake Roosevelt and has contaminated the surface water, ground water, sediments, and biological resources there. Pet. App. 71a ¶¶ 6, 7. The slag continues to decay physically and chemically, releasing arsenic, cadmium, copper, zinc, and lead into the environment and causing harm to human health and the environment. Pet. App. 5a–6a. Technical evidence demonstrates the Trail Smelter is the predominant source of contamination in the Upper Columbia River and Lake Roosevelt. Pet. App. 5a–6a.

In 1999, the Environmental Protection Agency began an assessment of what it termed the Upper

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[3] Teck asserts that its slag disposal was in accordance with the laws of Canada. Pet. Question Presented 2. This assumes facts beyond the pleadings and the record. This case is before the Court on denial of Teck's motion to dismiss, which Teck filed before answering Respondents' complaints. Teck is not entitled to the benefit of "facts" that it has neither alleged nor proven. Teck similarly asserts that no second party was involved in the disposal of its hazardous wastes. This too is a factual assertion not properly before the Court.

[4] Franklin D. Roosevelt Lake (Lake Roosevelt) was created when the Columbia River was blocked by the construction of the Grand Coulee Dam in the early 1940s.

Columbia River Site (the Site), defined as "the areal extent of contamination in the United States associated with the Upper Columbia River." Pet. App. 69a. EPA's assessment found heavy metals contamination and slag throughout the area. Pet. App. 5a. EPA completed the assessment in 2003 and concluded the Site was eligible for the list of the most contaminated sites in the country, the National Priorities List (NPL). Pet. App. 6a, 72a. EPA determined the releases of hazardous substances at the Site "may present an imminent and substantial endangerment to public health or welfare or the environment." Pet. App. 75a ¶ 4.

When the EPA proposed listing the Site on the NPL, Teck Cominco American, Inc. (Teck American), a wholly owned American subsidiary of Teck, approached the EPA and proposed to conduct a limited human health study if the EPA would defer proposing listing the Site on the NPL. Pet. App. 6a. EPA and Teck American entered into negotiations, which ended when EPA concluded Teck American's proposed investigation would not meet CERCLA's requirements in at least five essential ways, and would not provide adequate information to allow the EPA to select an appropriate remedy for the contamination at the Site. Pet. App. 74a–75a ¶ 18. As a result, on December 11, 2003, the EPA issued a Unilateral Administrative Order (the EPA Order) to Teck under CERCLA § 106(a), which directed Teck to investigate the contamination at the Site under CERCLA and evaluate alternatives for cleaning up the Site. *See* Pet. App. 68a–99a (EPA Order), 6a. On January 12, 2004, Teck sent the EPA a letter stating that it would not comply with the Order. Pet. App. 102a–04a. The federal government did not bring an action to enforce the EPA Order. Pet. App. 6a.

B. Proceedings Below

On July 21, 2004, two members of the Confederated Tribes of the Colville Reservation, Joseph Pakootas and Donald R. Michell (collectively Pakootas), filed a complaint under CERCLA's citizen suit provision in the United States District Court for the Eastern District of Washington, seeking enforcement of the EPA Order. Pet. App. 6a, 105a–12a. Without filing an answer, on August 26, 2004, Teck filed a motion to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6). Teck argued the court lacked personal and subject matter jurisdiction and the complaint failed to state a claim upon which relief could be granted. While that motion was pending, the State of Washington (the State) moved to intervene as of right under 42 U.S.C. § 9659(g) and filed a complaint in intervention. Pet. App. 7a, 113a–19a. The court granted the State's motion and considered Teck's pending motion to dismiss to apply to both Pakootas' and the State's complaints. Pet. App. 7a.

The district court denied Teck's motion to dismiss, finding the court had subject matter jurisdiction over the action, the court had specific personal jurisdiction over Teck under Washington's long-arm statute, and Pakootas and the State had stated claims upon which relief could be granted. Pet. App. 59a. The district court recognized that the case involved applying a domestic law to clean up a site located entirely within the United States. Pet. App. 37a–38a. Nevertheless, the court assumed, for the sake of its analysis, that applying CERCLA to clean up pollutants discharged in Canada, but which came to rest in the United States, was an extraterritorial application of the statute. Pet. App. 37a–38a. The court ruled that, even if extraterritorial, the application of CERCLA in this case was nonetheless permissible, given CERCLA's focus on remedying domestic conditions and the significant harmful effects Teck's contamination caused within the

United States. Pet. App. 57a. The district court also held that it could not rule out Teck's liability as one who "arranged for disposal" of hazardous substances under 42 U.S.C. § 9607(a)(3). Pet. App. 49a.[5] The district court *sua sponte* certified its order for immediate appeal pursuant to 28 U.S.C. § 1292(b); the court of appeals granted permission to appeal. Pet. App. 59a, 9a.

On appeal, Teck did not challenge the district court's ruling that the court had personal jurisdiction over Teck and did not argue on appeal that the court lacked subject matter jurisdiction over the case. Pet. App. 59a, 9a. Accordingly, those claims are abandoned. Instead, Teck asserted that the district court erred when it denied Teck's Rule 12(b)(6) motion by (a) rejecting Teck's argument that the case involved an improper extraterritorial application of CERCLA, and (b) finding Teck could be held liable as a party who "arranged for disposal" under 42 U.S.C. § 9607(a)(3). Pet. App. 9a–10a.

A unanimous court of appeals affirmed the district court. Pet. App. 3a. The court concluded "this case involves a domestic application of CERCLA," and did not therefore trigger the presumption against extraterritorial application of United States law. Pet. App. 3a. The court also concluded that Teck could be held liable for having

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[5] In the district court, Teck submitted what purports to be a note from the Canadian Embassy. The district court granted the Respondents' motion to strike the note. Order Granting Motion To Strike Exhibits In Part, *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-040256-AAM (E.D. Wash. June 29, 2004). Teck did not challenge that ruling below, and the note is not properly part of the record in this case. Yet, nonetheless, Teck submitted it to the appellate court and has included the document in the petition appendix (Pet. App. 100a–01a), relying on it to support its petition (Pet. 4, 24). No facts beyond those pled in Respondents' complaints are properly before the Court, and Teck is not entitled to the benefit of one-sided, unlitigated, and unproven "facts."

"arranged for disposal" of hazardous substances and that the involvement of a second party is not a prerequisite to such liability. Pet. App. 3a.

The appellate court recognized that EPA's authority under CERCLA § 106(a) and CERCLA's liability provisions are triggered by disposals that subsequently cause releases or threatened releases of hazardous substances into the environment. Pet. App. 3a. The court of appeals concluded that the requisite releases occurred at the Site in the United States when the slag from Teck's smelter reached the Site and when the slag leached heavy metals and other contaminants into the surrounding environment. Pet. App. 14a–15a. Since the Site is specifically limited to the environment within the United States,[6] the court of appeals determined that applying CERCLA to remedy that contamination to be wholly domestic. Pet. App. 21a.

The court below also determined that holding Teck liable as having "arranged for disposal" of the slag would not involve an extraterritorial application of CERCLA. Pet. App. 20a. The court observed that CERCLA is a remedial statute that focuses on remedying the harmful effects of past conduct, and CERCLA does not regulate or prohibit any "arrangement" for disposal. Pet. App. 20a. The court recognized that liability arises when a disposal leads to hazardous substances being released at a Site in the United States, regardless of the method of disposal.

The appellate court also rejected Teck's argument that it can be held liable as having "arranged for disposal" of hazardous substances only if it involves a second party

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[6] CERCLA defines "environment" as waters, land, and air within the United States or under the jurisdiction of the United States. 42 U.S.C. § 9601(8). Accordingly, CERCLA liability is triggered only by a release of hazardous substance into the United States environment.

in the disposal. The court rejected Teck's argument that generators of hazardous wastes who arrange for the disposal of their wastes themselves are free from liability under § 9607(a)(3), rejecting an argument by Teck based on *American Cyanamid Co. v. Capuano*, 381 F.3d 6 (1st Cir. 2004). Pet. App. 25a–26a.

On June 2, 2006, one month before the appellate court issued its ruling, Teck and the EPA signed a settlement agreement that requires Teck to guarantee, and Teck American to conduct, (a) an investigation into the nature and extent of contamination at the Site that meets CERCLA requirements and (b) an evaluation of alternatives under CERCLA for cleaning up the Site. On the same day, the EPA sent a letter to Teck in which it withdrew its December 1993 Order. Pet. App. 120a. The appellate court took judicial notice of the settlement. It determined that the settlement did not moot the Respondents' claims for civil penalties and attorney fees, and left it to the district court on remand to determine whether the settlement mooted the Respondents' claims for declaratory and injunctive relief. Pet. App. 9a n.10.

Teck timely petitioned the court of appeals for rehearing and rehearing en banc. On October 30, 2006, the court of appeals denied the petition for rehearing and denied the petition for rehearing en banc, with no judge in the circuit requesting a vote on whether to hear the case en banc. Pet. App. 61a.

REASONS FOR DENYING THE WRIT

The Petition For Writ Of Certiorari should be denied for three reasons. First, the decision below creates no conflict in the circuits. The court of appeals correctly found—as have all other courts to address the issue—that a generator of hazardous waste who directly arranges for the disposal of its own waste may be liable for cleanup under Section 107(a)(3) of CERCLA. Teck's alleged circuit conflict is predicated entirely on dicta in a decision

of the First Circuit that resolved a different issue. *See American Cyanamid*, 381 F.3d 6 (finding parties liable even though they did not own or transport waste, but instead acted as "brokers" who constructively possessed the waste and arranged for its improper disposal).

Second, this case comes to the Court in the most preliminary of procedural postures—from denial of a Rule 12(b)(6) motion by Teck. Although Teck tries to put extra-record "facts" before the Court in order to support its claims, the only facts at this juncture are the allegations of the Respondents' complaints.[7] Teck also raises new issues in its petition, which were not raised or litigated below. Teck's new arguments and extra-record facts should not be litigated in the first instance before this Court.

Third, despite Teck's effort to create one, the court of appeals decision that there can be liability under CERCLA when a foreign corporation creates a hazardous waste site in the United States raises no issue of international law or comity.

A. There Is No Circuit Split Concerning Liability For Generators Who Dispose Of Their Waste

Teck's second Question Presented contests liability under CERCLA § 107(a)(3) and claims a circuit split on whether liability can attach if Teck did not involve "another party or entity" in its disposal of its slag. Pet. 9, 25–29. Section 107(a)(3) creates liability for persons who "arranged for disposal" of waste found at a contaminated site owned or operated by another party. CERCLA imposes liability on:

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[7] Such considerations explain in part why certiorari from interlocutory appeals is disfavored. *See, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari).

> "(3) any person who . . . arranged for disposal . . . of hazardous substances owned or possessed by such person . . . at any facility . . . owned or operated by another party or entity and containing such hazardous substances . . . ." 42 U.S.C. § 9607(a)(3).

Liability under CERCLA § 107(a)(3) is intended to apply to companies that generate waste and make the decision to dispose of it in such a way that it is released into the environment. *See* 1 Allan J. Topol & Rebecca Snow, *Superfund Law and Procedure* § 3:31 (2006) ("one thing about [§ 107(a)(3)] is clear: it makes generators of hazardous waste liable for cleanup . . . because they 'arrange' for the disposal of the wastes that they have created"). Congress has long recognized this purpose for this particular category of liability:

> "Generators create the hazardous wastes and . . . how to avoid them, and they determine whether and how to dispose of these wastes— on their own site or at locations controlled by others." S. Rep. No. 848, 96th Cong., 2d Sess. (1985), at 15.

The court of appeals, in affirming the denial of Teck's motion to dismiss, did not create any split among the circuits. Respondents' complaints satisfy CERCLA § 107(a)(3) by alleging that (a) Teck generated millions of tons of waste over the last century as a byproduct of smelting operations, (b) Teck disposed of the waste into the Columbia River, and (c) the waste has been released into the environment at the contaminated Site in the United States. Pet. App. 107–09a, 115–17a; *see also* Pet. App. 69a–76a (EPA findings about Teck's disposal of hazardous waste).

1. The First Circuit Decision In *American Cyanamid* Addresses A Different Issue In A Different Context And Presents No Conflict

When cases do not decide the same issue, they are not in "direct" conflict. Robert L. Stern et al., Supreme Court Practice 226 (8th ed. 2002) ("A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts."). *American Cyanamid*, 381 F.3d 6 (decided a different issue in a different context than the question presented by Teck).

In *American Cyanamid*, the trial court found the Capuanos liable as "operators" of a dump site under CERCLA § 107(a)(1) and as persons who had "arranged for disposal" of wastes at the site under Section § 107(a)(3). On appeal, the First Circuit addressed whether a dump operator could be liable as an "arranger" by acting as a middleman and "brokering" waste disposal at the dump. The Capuanos argued that they did not own or possess the waste they had arranged to dispose of at the dump and, therefore, arranger liability did not apply. *American Cyanamid*, 381 F.3d at 23. The First Circuit followed cases imposing liability on similar persons who did not own or possess waste but who "controlled" the disposal. *Id.* at 24–25. The court ultimately held that the term "owned or possessed" in Section 107(a)(3) could be read broadly to include "constructive" ownership or possession—a holding that is neither directly on point, nor directly in conflict with, the court of appeals decision below. *See id.* at 25.

In contrast, the appellate court below addressed factual allegations in complaints that bear no resemblance to the facts in *American Cyanamid*. Respondents did not allege that Teck brokered waste for

others. Instead, Respondents alleged that Teck generated, owned, controlled, and disposed of waste in the Columbia River, and the river carried the waste to the contaminated site. Because the facts and holdings of the two cases are different, the two rulings present no direct conflict. *See Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956) ("[I]t is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests."). Lacking any real conflict, Teck relies on dicta by the First Circuit to claim a conflict—but this does not create a circuit split or warrant review. *See Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from denial of cert) ("We sit, after all, not to correct errors in dicta; '[t]his Court reviews judgments . . . .'"). The First Circuit briefly parsed out two grammatical constructions of CERCLA § 107(a)(3), but did not rest its holding on this grammatical parsing. Its holding instead examines and relies on prior cases and the unique facts in that case. *American Cyanamid*, 381 F.3d at 23–24. Based on those facts, the court rejected a waste broker's attempt to create a loophole that would frustrate the purposes of CERCLA. *See American Cyanamid*, 381 F.3d at 25 (If "CERCLA [did] not . . . impose liability on a party that constructively possessed hazardous waste and arranged for its illegal disposal, then the statute would be subject to a loophole through which brokers and middlemen could escape liability . . .").[8]

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[8] A subsequent decision saw no conflict between *American Cyanamid* and the decision below. *See Vine Street, LLC v. Keeling ex rel. Estate of Keeling*, 460 F. Supp. 2d 728, 748–50 (E.D. Tex. 2006) (corporate parent of a dry cleaning machine manufacturer liable for releases from a dry cleaning operation because the "thrust" of decisions like *Pakootas* and *American Cyanamid*, taken in tandem with the purposes of CERCLA, counseled against interpreting § 9607(a) "in any way that apparently frustrates the statute's goals").

Indeed, nothing in *American Cyanamid* indicates the First Circuit would allow Teck to avoid liability here.

As the court below recognized, if adopted in this case, Teck's argument "would leave a gaping and illogical hole in the statute's coverage, permitting argument that generators of hazardous waste might freely dispose of it themselves and stay outside the statute's cleanup liability provisions." Pet. App. 26a. Teck suggests any loophole would be covered by "operator" liability under CERCLA § 107(a)(1). Pet. 27 n6. Yet Teck fails to show how operator liability applies to a company that disposes of waste into a river, when the waste is carried away from land they own or operate and contaminates the riverbed or lakebed. In any event, there is no reason to strain to find liability under other sections of CERCLA, because a company that generates and disposes of waste is liable under Section 107(a)(3).

2. Teck Wrongly Claims Uniform Support In Other Circuits

Teck claims the "substantially uniform view of the Circuits" supports its position and cites numerous decisions to infer they uniformly applied "arranger" liability based on Teck's approach to the sentence structure of CERCLA § 107(a)(3). *See* Pet. 26. Teck incorrectly describes the circuit uniformity; most courts have not applied liability after parsing the sentence structure of Section 107(a)(3). *See Vine Street*, 460 F. Supp. 2d at 748 (so noting, upon analysis of recent cases). The courts instead have followed an intensely factual, case-by-case approach, under which liability hinges on a variety of facts examined to "determine whether a defendant was sufficiently responsible for

hazardous-waste contamination so that it can fairly be forced to contribute to the costs of cleanup."[9]

Teck fails to cite a single case holding that a generator of waste—like itself—is *not* liable if it did not first arrange for disposal with another party.[10] In fact, Respondents can find no case where a person disposing of waste has avoided liability using Teck's argument. When courts have addressed the liability of a company that generated waste and disposed of the waste itself, the courts have found that generator liable without requiring the disposal first be carried out by another party. *See, e.g., Colorado v. Idarado Mining Co.*, 707 F. Supp. 1227, 1241 (D. Colo. 1989), *amended by* 735 F. Supp. 368 (D. Colo. 1990), *rev'd on other grounds*, 916 F.2d 1486

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[9] *See Morton Int'l, Inc. v. A.E. Staley Mfg.* Co., 343 F.3d 669, 677-78 (3d Cir. 2003); *see also Vine Street*, 460 F. Supp. 2d at 749–50 ("Federal courts have developed a sophisticated case-by-case approach" to fulfill Congressional intent that "those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created") (internal citation omitted); *see also Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317–18 (11th Cir. 1990) (rejecting reliance on any *per se* rule for arranger liability).

[10] None of the cases cited by Teck have exculpated a company that directly disposed of waste. *See GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433, 448 (6th Cir. 2004) (analyzing liability of company for waste disposed of by a separate company, from whom it had purchased chemical goods); *Morton Int'l, Inc.*, 343 F.3d at 679 (analyzing liability of company that shipped material to a separate company for processing into usable form for releases from second company's processing); *Raytheon Constructors, Inc. v. Asarco, Inc.*, 368 F.3d 1214 (10th Cir. 2003) (analyzing liability of minority shareholder in a mining company based on actions taken by the predecessor's president); *United States v. Vertac Chem. Corp.*, 46 F.3d 803, 811 (8th Cir. 1995) (analyzing liability of United States for waste released by a company with which it contracted).

(10th Cir. 1990) (finding a generator liable as an "arranger" for dumping wastes directly into a river); *see also Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 659 (6th Cir. 2000) (finding a generator would be liable as an "arranger" if it had discharged its waste into the Kalamazoo River).

3. An Appeal Of A Motion To Dismiss Is Not The Appropriate Vehicle To Examine Liability For Disposal

As outlined above, arranger liability is "a fact-sensitive inquiry that requires a multi-factor analysis." *Morton Int'l, Inc. v. A.E. Staley Mfg.* Co., 343 F.3d 669, 677 (3d Cir. 2003). The Rule 12(b)(6) record does not establish how disposal occurred, who carried it out, and what employees, contractors, or other persons were involved. Certiorari should therefore be denied for the separate reason that there is no factual record appropriate for examining liability and no final judgment on liability.

B. Teck's New Arguments Are Not Appropriate For Review By This Court

For the first time, Teck offers a new approach to CERCLA 107(a)(3), borrowing from subsection (a)(4) to argue that CERCLA cannot apply to it because it arranged to dispose of its pollution at a different "facility" than the one from which hazardous substances were released. Pet. 18–21. Teck's new argument does not merit review from this Court because it was not raised below, is based on facts not in the record, and has been rejected by all courts that have addressed similar arguments.

The district court, court of appeals, and parties have never had the opportunity to consider or respond to Teck's new argument. The argument reflects Teck's factual characterizations of matters that are outside the

record and are inappropriate for this Court to consider in the first instance. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168–69 (2004) (except in exceptional circumstances, the Court does not decide questions not raised or resolved in the lower court); *accord Yoakim v. Miller*, 425 U.S. 231, 234 (1976).

Moreover, Teck's new argument stretches statutory terms and mischaracterizes the pleaded facts. This is contrary to review under Rule 12(b)(6), where pleaded facts are taken as true and all inferences are construed in favor of the Respondents. While Teck may defend its potential liability on remand by developing a full factual record, the record at this stage is no basis for Teck's new arguments. For example, Teck asserts its Smelter is the relevant "facility" (Pet. 20), when the only "facility" alleged in the EPA Order and Respondents' complaints is the Upper Columbia River Site (Pet. App. 75a, 105a–19a). Teck further argues that its discharge of slag into the river in Canada constitutes actionable "releases" under CERCLA (Pet. 19–20[11]) when the only CERCLA "releases" alleged in the EPA Order and Respondents' complaints are releases of hazardous substances from the slag that has come to rest at the Site (Pet. App. 75a, 105a–19a). Teck's reliance on its

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[11] CERCLA defines "facility" as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, *or otherwise come to be located*." 42 U.S.C. § 9601(9)(B) (emphasis added). The court of appeals decision examined potential liability of a person who "arranged for disposal . . . of hazardous substances . . . at any facility . . . owned or operated by another party . . . and containing such hazardous substances. . . ." 42 U.S.C. § 9607(a)(3). "Disposal" means "the discharge, deposit, injection, dumping . . . or placing of any . . . hazardous waste into or on any land or water so that such . . . hazardous waste . . . may enter the environment." 42 U.S.C. § 6903(3).

characterization of the facts confirms why this argument should first be considered by a lower court.

Had Teck raised this issue below, the court of appeals would likely have followed other courts that have rejected similar arguments. *See United States v. Conserv. Chem. Co.*, 619 F. Supp. 162, 234 (W.D. Mo. 1985)[12] (rejecting argument that a generator cannot be liable under CERCLA if it initially disposed of its waste somewhere other than where the wastes ultimately came to rest); *accord United States v. Ward*, 618 F. Supp. 884, 895 (E.D. N.C. 1985) (same); *Violet v. Piciolo*, 648 F. Supp. 1283, 1291 (D. R.I. 1986) (same) (overruled on other grounds).

The fact-bound nature of Teck's new argument is further illustrated by Teck's citation to cases involving "passive migration." These cases involve completely different factual scenarios than anything alleged in Respondents' complaints. *See* Pet. 20 n.4 (citing *United States v. 150 Acres of Land*, 204 F.3d 698, 701 (6th Cir. 2000) (drums leaking hazardous liquids into the ground); *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 356 (2d Cir. 1997) (same); *United States v. CDMG Realty, Co.*, 96 F.3d 706, 710 (3d Cir. 1996) (contamination of soil)). Under the existing record, it is implausible for Teck to compare its disposal of tens of millions of tons of slag into a free-flowing river to these other factual scenarios involving contamination spilled on solid ground. Nor are the cases legally similar: each decides if a *former owner or operator* of a site contaminated by migration of contaminants owned or operated the site "'at the time of disposal' of a hazardous substance" for purposes of CERCLA § 107(a)(2). 42 U.S.C. § 9607(a)(2).

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[12] *Conservation Chemical* was superceded by statute on other grounds, as stated in *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90 (2d Cir. 2005).

C. The Court Of Appeals Decision Affirming Denial Of Teck's Rule 12(b)(6) Motion Raises No Substantial Issue Of International Law Or Comity

1. Optional Diplomatic Processes Do Not Preclude The Application Of CERCLA In This Case

Teck first argues that the "decision below upsets a century-old tradition of bilateral solutions to transboundary pollution problems." Pet. 10. Teck alleges that "[s]ince the Industrial Revolution, the United States and Canada have resolved their transboundary pollution problems bilaterally, including government-to-government diplomatic negotiations and, occasionally, arbitrations between the sovereigns." Pet. 10. Nothing in the record supports this sweeping factual proposition.

Of the various treaties Teck references, only the 1909 Boundary Waters Treaty even arguably applies to Teck's pollution of the Site.[13] Boundary Waters Treaty, Jan. 11, 1909, U.S.-Gr. Br., 36 Stat. 2448 (the Treaty). The Treaty's focus, however, is the equitable allocation of water resources between Canada and the United States. Jennifer Woodward, *International Pollution Control: the United States and Canada—the International Joint Commission*, 9 N.Y.L. Sch. J. Int'l & Comp. L. 325, 326 (1988) (Woodward); Treaty art. II. The only provision that

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[13] Among other treaties, Teck refers to the Great Lakes Water Quality Agreement of 1978, the 1991 Agreement Between the Government of the United States of America and the Government of Canada on Air Quality, and the North American Free Trade Agreement. *See* Pet. 11–12. None of these treaties speak to remedying the effects of Teck's discharge of contaminants into the Columbia River. Indeed, the treaties Teck cites focus on issues related to the regulation of ongoing polluting activities in bordering countries; they do not address how to remedy the effects of historical transboundary pollution.

refers to transboundary pollution is Article IV, which provides that waters flowing across the U.S.-Canadian border "shall not be polluted on either side to the injury of health or property on the other." Treaty art. IV. During negotiations for the Treaty, Canada advocated for a provision "forbidding water pollution having transboundary consequences," and attempted to establish an agency that would enforce the prohibition. Woodward at 327. The United States refused to agree to either and only reluctantly accepted the language in Article IV. Woodward at 326.

In addition, the Treaty's mechanisms to address "differences" between the two countries are entirely optional. Treaty art. IX (allowing for nonbinding "recommendations"), art. X (allowing for binding dispute resolution).[14] Notably, the binding dispute resolution process in the Treaty has never been invoked in the Treaty's 98-year history. *Government of Province of Manitoba v. Norton*, 398 F. Supp. 2d 41, 56 (D. D.C. 2005); Woodward at 328.[15] At best, therefore, the Treaty provides a voluntary alternative for addressing issues related to transboundary pollution; it does not provide the exclusive means. Woodward at 328; *see also Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 506–08 (1971)

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[14] For the United States to invoke the binding dispute resolution process in the Treaty, the consent of the United States Senate is required. Treaty art. X

[15] Teck implies, erroneously, that the Trail Smelter Arbitration was conducted pursuant to the Treaty's binding dispute resolution provision. The initial proceeding was pursuant to Article IX's non-binding procedure, and only later did the United States and Canada agree to submit issues to arbitration under a separate convention entered into specifically for that purpose. Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue?* 14 N.Y.U. Envtl. L.J. 233, 251 (2006).

(Douglas, J., dissenting on other grounds) (nuisance suit for transboundary pollution was "not precluded by the Boundary Waters Treaty"). Justice Douglas recognized that the Treaty "does not evince a purpose on the part of the national governments of the United States and Canada to exclude . . . other remedies for water pollution." *Wyandotte Chem. Corp.*, 410 U.S. at 507.[16] Nothing in the record in this case suggests the United States or Canada sought to invoke either of the Treaty's dispute resolution procedures to address Teck's legacy of contamination at the Site.

In addition, numerous cases over the last century demonstrate that litigation has often been a means for addressing transboundary pollution between the United States and Canada. *See, e.g., Wyandotte Chem. Corp.*, 410 U.S. at 506–08 (litigation over pollution by Dow Canada that eventually harmed Lake Erie); *Her Majesty the Queen in Right of Ontario v. United States Envtl. Prot. Agency*, 912 F.2d 1525 (D.C. Cir. 1990) (suit by Ontario to require EPA to reduce air emissions in the United States causing damage in Canada); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 975 (2d Cir. 1984) (Ontario suing to protect Canadian citizens harmed by U.S. company's pollution of Lake Ontario and the Niagara River); *Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213 (6th Cir. 1974) (suit by Canadian landowners against U.S. corporations, whose U.S. plants emitted noxious fumes); *Norton*, 398 F. Supp. 2d 41 (suit by Province of Manitoba against the U.S. Secretary of Interior over a water diversion project that could pollute Canadian waters).[17]

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[16] Indeed, the Treaty explicitly allows United States and Canadian citizens to go to court to redress harm caused by the diversion of water in the other country. Treaty art. II.

[17] These lawsuits involve transboundary air pollution and pollution in and around the Great Lakes, which are the

CERCLA was enacted against *this* backdrop, not a century of exclusively bilateral diplomacy, as Teck asserts.[18] Pet. 12. Further, notwithstanding Teck's implications to the contrary, nothing in international law or comity requires a court to defer to an optional diplomatic process. *See Fed. Trade Comm'n. v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980) (refusing to defer to optional processes in the Hague Convention). Teck's contention to the contrary provides no basis for review.

2. This Case Concerns Application Of CERCLA To A Hazardous Waste Site In The United States And The Presumption Against Extraterritorial Application Does Not Apply

Teck next tries to create a substantial question of international law or comity from the denial of its motion to dismiss by asserting that the decision below erroneously failed to apply the presumption against extraterritorial application of U.S. law. Teck's argument is unsound for two reasons. First, the presumption does not apply here. Second, even if it did, the purpose of the presumption is to avoid "unintended clashes between our laws and those of other nations." *E.E.O.C. v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991). As the appellate court correctly found, there is no such clash in this case.

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subject of the other treaties Teck cites. These further dispel the notion that disputes involving transboundary pollution have been resolved by the United States and Canada only through bilateral diplomacy.

[18] Indeed, to the extent the Treaty and CERCLA can be said to conflict, CERCLA, as a later-enacted statute, "renders the treaty null." *Reid v. Covert*, 354 U.S. 1, 18 (1957).

The presumption against extraterritorial application applies only if a case actually involves an extraterritorial application of United States law. *In re Maxwell Commc'n Corp. plc*, 186 B.R. 807, 815–16 (S.D. N.Y. 1995) ("[f]irst, a court must determine if the presumption applies at all"); *accord Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993). For purposes of Rule 12(b)(6), the court of appeals correctly concluded the allegations in Respondents' complaints present a domestic application of CERCLA to the cleanup of the Upper Columbia River Site. The Site is in the United States; CERCLA dictates how pollution in the United States is cleaned up.

Teck bypasses the domestic focus of CERCLA, and instead argues that it cannot be held liable for activities "undertaken exclusively in Canada." Pet. 14. Even if Teck had established this alleged exclusivity in the limited Rule 12(b)(6) factual record—and it did not—and even if dumping a massive quantity of hazardous waste into the free flowing Columbia River ten miles north of the U.S.-Canada border could be considered an activity wholly within Canada, CERCLA does not regulate or prohibit that activity. It merely provides a remedy for the harm that activity caused in this country.[19] *Meghrig v.*

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[19] CERCLA is a remedial law, like the tort law it was based upon. 126 Cong. Rec. 26,788 (1980) (statement of Rep. Jeffords) (indicating CERCLA was to codify the tort of strict liability for ultrahazardous activities); 126 Cong. Rec. 26,782 (1980) (statement of Rep. Gore) (same). In similar cases involving application of United States remedial laws to address domestic harm caused by foreign defendants, courts have considered those tort-based laws to be applied domestically; indeed, the presumption against extraterritoriality has not even been mentioned. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 525 (1987) (French airplane manufacturing companies owned by the French Government sued for negligent manufacture when plane crashed in Iowa); *Wyandotte Chem. Corp.*, 401 U.S. at 494 (Ohio

KFC W., Inc., 516 U.S. 479, 483 (1996) (noting CERCLA's character as a remedial, rather than regulatory, statute). No principle of international law or comity allows Teck to evade responsibility for the tens of millions of tons of pollution that it directed into the United States.

Teck correctly recognizes that the purpose behind the presumption against extraterritoriality is "to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248. However, Teck points to no law of Canada or British Columbia with which CERCLA conflicts. CERCLA did not and does not prohibit any action, or require Teck to take any action, related to the Smelter's operations. CERCLA therefore has no regulatory impact on Teck and presents no conflict with any regulation by Canada or British Columbia of the Smelter's operations and discharges.[20] Pet. App. 22a. Moreover, to the extent Teck's claim that its discharge of slag was in accordance with the laws of Canada (Pet. Question Presented 2) is intended to demonstrate a "clash of laws", it is not an established fact on Teck's Rule 12(b)(6) motion and is outside the scope of review in this case. The same is true of Teck's reliance on a diplomatic note that was stricken by the district court to support its "clash of laws" contention. Pet. 13.[21]

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sued Dow Canada in nuisance for the discharge of mercury into streams in Canada which ultimately harmed Lake Erie in the United States). CERCLA is no different in impact or scope than the tort laws applied to foreign defendants in the cases above.

[20] Even if CERCLA could somehow be said to regulate the discharge of slag from Teck's Smelter, there is nothing left to regulate, for Teck ceased discharging slag in 1995 (eight years before the EPA Order was issued).

[21] Both CERCLA and its Canadian counterpart impose liability even if a disposal was done in accordance with the applicable law at the time the disposal occurred. Indeed, the

The facts of this case are decidedly different from the circumstances in the cases Teck cites in support of its extraterritoriality argument, *Aramco* and *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).[22] In those cases, United States law was applied outside the territorial jurisdiction of the United States to regulate conduct in foreign countries. *Aramco*, 499 U.S. at 249–51 (applying Title VII of the Civil Rights Act to employment practices in Saudi Arabia); *Empagran*, 542 U.S. at 174 (applying the Sherman Act to anti-competitive conduct abroad). In both of those cases, the laws purported to proscribe specific conduct (discriminatory employment practices and price fixing) abroad. In contrast, here, CERCLA is applied within the territorial jurisdiction of the United States to the cleanup of a domestic site. CERCLA does not proscribe, or even regulate, any conduct in Canada. It is not, therefore, being applied

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applicable Canadian cleanup law is virtually identical to CERCLA, further disproving any clash of laws. In Canada, primary jurisdiction for addressing historical pollution rests with the Provinces. Canadian Constitution Act, 1867 (U.K.), 30, 31 Vict. C. 3. British Columbia's Environmental Management Act (EMA) holds the same categories of polluters "absolutely, retroactively and jointly and separately liable" for the costs of cleanup. EMA § 47(1). Liability attaches *regardless of whether the polluting activity was lawful at the time it occurred; and regardless of whether the liable party had a permit or other governmental approval allowing the polluting activity*. EMA § 47(4). Thus, Teck is subject to the same legal liability for pollution it caused on the Canadian side of the border as CERCLA imposes for pollution caused in the United States.

[22] The facts alleged in this case also differ from the facts in this Court's most recent decision addressing extraterritorial application of United States law. *See Microsoft Corp. v. AT&T Corp.*, No. 05-1056, WL 123838 (U.S. Apr. 30, 2007). *Microsoft* involved an attempt to apply United States patent law to purely foreign acts of infringement. *Id.* at *10.

extraterritorially and does not conflict with Canada's or British Columbia's regulatory authority or sovereignty.

A Canadian court recently recognized that CERCLA poses no threat to Canadian or provincial sovereignty. *United States v. Ivey*, 30 O.R.3d 370 (Ontario Ct. App. 1996). When enforcing a CERCLA judgment against Canadians for costs EPA incurred to clean up a site in the United States, the court concluded:

> "The United States did not seek to enforce any laws against extraterritorial conduct. It simply sought financial compensation for actual costs incurred in the United States in remedying environmental damage inflicted in the United States on property in the United States. It is no extension of U.S. sovereign jurisdiction to enforce its domestic judgments against those legally accountable for an environmental mess in the United States[.]" *Id.* at 374 ¶ 19.

The United States has also taken the position that applying CERCLA to remediate pollution coming into the United States from a foreign country is a permissible application of the statute. EPA took that position when it issued the Order in this case directing Teck to investigate the contamination at the Site under CERCLA. Pet. App. 68a–99a (the Order). The United States took the same position in *ARC Ecology v. United States Department of the Air Force*, 411 F.3d 1092 (9th Cir. 2005). In that case, Philippine nationals tried to apply CERCLA outside the territorial jurisdiction of the United States, to the cleanup of former military bases in the Philippines. The United States informed the court:

> "A different analysis applies when a hazardous substance is released or there is a threat of such a release from another country into the United States—for instance, across the Canadian border. EPA has responded to such releases under

> CERCLA. ER 42. EPA's response in such a case is *not an extraterritorial application of CERCLA* because EPA is addressing a release into the environment in the United States."[23] Brief For The Federal Appellees at 19 n.2, *ARC Ecology v. United States Dep't of the Air Force*, No. 04-15031 (9th Cir. Aug. 4, 2004), 2004 WL 1935956 (emphasis added).

These cases demonstrate that both Canadian courts and the United States recognize that applying CERCLA to remedy transboundary pollution that comes to rest in the United States is no threat to Canadian sovereignty.[24]

Teck misapplies cases stating that statutes are to be interpreted to avoid "unreasonable interference with the sovereign authority of other nations." *See* Pet. 17–18. The proposition is true, but courts must first be satisfied that interference with the sovereign authority of another nation will occur. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993) (noting the "only substantial question" was "whether 'there is in fact a true conflict between domestic and foreign law'").[25] As shown above,

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[23] The district court in *ARC Ecology* agreed, finding "[i]n situations where a hazardous substance . . . is released . . . into the U.S. from a bordering country, such as Mexico or Canada, EPA could respond under CERCLA." *ARC Ecology v. United States Department of the Air Force*, 294 F. Supp. 2d 1152, 1158 (N.D. Cal. 2003).

[24] *See also Canron, Inc. v. Fed. Ins. Co.*, 82 Wash. App. 480, 482, 918 P.2d 937 (1996) (the insured, a Canadian company that EPA held liable for wastes the company trucked to a United States facility for disposal, sought insurance coverage for that environmental claim). Teck's case is no different from *Canron*, except the mode of transportation was a river instead of a truck.

[25] In *Hartford Fire*, the Court concluded that there was no foreign law impediment, notwithstanding that the British

applying CERCLA poses no conflict with Canadian law or threat to Canadian sovereignty. The canon of construction does not, therefore, apply.[26]

Moreover, even if applying CERCLA to Teck constituted an extraterritorial application of the law — and it does not—Teck erroneously characterizes the "effects doctrine." Pet. 16–17. That doctrine provides that the presumption against extraterritoriality does not apply when foreign conduct causes significant adverse effects in the United States. *Hartford Fire*, 509 U.S. at 796. Teck implies that the effects doctrine only justifies applying United States law if the defendant is a United States citizen who "commits acts" in the United States. Pet. 17. Teck is incorrect. *Empagran*, 542 U.S. at 165 (finding "wholly foreign" price-fixing to violate the Sherman Act if it results in domestic injury); *Hartford Fire*, 509 U.S. at 796 (addressing price-fixing in London by London insurers). No court has limited the effects doctrine in the manner Teck suggests. *Empagran*, 542 U.S. at 165 ("application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress

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Government filed a brief contending the United States law conflicted "significantly" with British law. *Hartford Fire*, 509 U.S. at 798. The Court noted a "true conflict" only arises when compliance with both the domestic and foreign laws is impossible. *Id.* at 799.

[26] Teck also misquotes *Empagran* and the canon of construction in that case. Pet. 14 (stating *Empagran* instructs that "as long as a 'statute's language reasonably permits an interpretation' that avoids extraterritorial application, a court 'should adopt it.'"). *Empagran* actually states: "If the statute's language reasonably permits an interpretation consistent with that intent [the intent of the Foreign Trade Antitrust Improvements Act of 1982], we should adopt it." *Empagran*, 542 U.S. at 174.

domestic antitrust injury that foreign anticompetitive conduct has caused").

Further, the effects doctrine is wholly consistent with international law. It is well-established that a country can apply its law to foreign conduct that takes place outside its territory when the conduct causes adverse effects within its territory. *Restatement (Third) of the Foreign Relations of the United States Restatement* § 402(1)(c) (1987). International law also specifically contemplates that suits for damages are available "in the state where the injury occurred." *Restatement* § 602(2) cmt. c.

Applying CERCLA to Teck is not an extraterritorial application of the law and is consistent with international law and comity. Teck's assertions to the contrary do not merit review by this Court.

3. Denial Of Teck's Rule 12(b)(6) Motion Does Not Disrupt Foreign Relations Powers

Teck asserts that the decision below will "usurp the foreign-relations powers of the political branches" and "threatens to disrupt the foreign policy of the United States." Pet. 21. Apart from dubious speculation, Teck's argument relies on the propositions that (1) all transboundary pollution causing significant harm in the United States historically has been and must be addressed through bilateralism and (2) EPA's Order should be presumed to be contrary to the authority and will of the President. Pet. 21.[27]

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[27] Teck implies that applying CERCLA here will violate international law. Pet. 21. As is the case throughout its petition, Teck points to no international law or principle that would be violated. In contrast, Teck's position (that it should not be held liable for harm it caused in the United States) is contrary to principles of international law. *See Restatement*

As to Teck's first proposition that CERCLA liability is contrary to "elegant bilateralism," Teck's claim is overstated. As indicated above, diplomacy-based bilateralism has long coexisted with other means for addressing transboundary harms in the United States, including litigation in United States courts.

As to the President's foreign affairs powers, this case poses no more a foreign policy threat than any other case in which United States law has been used to redress harm caused by a foreign defendant in the United States. *E.g.*, *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 525 (1987) (French airplane manufacturer sued for negligent manufacture when one of its planes crashed in Iowa); *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 494 (1971) (Ohio sued Dow Canada in nuisance for Dow's discharge of mercury into streams in Canada which ultimately harmed Lake Erie in the United States); *Durham v. Herbert Olbrich GMBH & Co.*, 404 F.3d 1249 (10th Cir. 2005) (a product liability suit against a German manufacturer of a component that injured a worker in Oklahoma); *First Nat'l Bank & Trust Corp. v. American Eurocopter Corp.*, 378 F.3d 682 (7th Cir. 2004) (product liability suit against French manufacturer of helicopter that caused injury in Indiana).

Moreover, Teck overlooks that it was the President (acting through EPA) who issued the Order at the center of this case in the first place. Pet. App. 68a–99a (the Order). Courts presume "the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States." *United States v. Corey*, 232 F.3d 1166, 1179 (9th

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§ 602(2) cmt. c. (specifically contemplating private remedies for harm caused by transboundary pollution).

Cir. 2000).[28] Nothing in the record indicates that the same presumption should not also apply to the President's issuance of the Order in this case.

Finally, the argument that Teck makes here—that the President's foreign policy goals can take precedence over, and justify not enforcing, applicable domestic laws (Pet. 22)—was recently rejected by this Court. *Massachusetts v. Envtl. Prot.* Agency, 127 S. Ct. 1438, 1463 (2007) ("while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws").

CONCLUSION

The Court should deny the petition for writ of certiorari.

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[28] The effect of the EPA's withdrawal of the EPA Order following a Settlement Agreement between EPA and Teck after this suit was commenced remains to be litigated. Pet. App. 9a n.10. It is notable that the Settlement nonetheless requires an investigation of the Site that meets CERCLA requirements. (The settlement agreement can be found on Teck's website at http://www.teckcominco.com/articles/roosevelt/index.htm.)

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No. 06-1188

IN THE

Supreme Court of the United States

TECK COMINCO METALS, LTD.,
Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL,
AND STATE OF WASHINGTON,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to this Court's Rule 15.8, petitioner Teck Cominco Metals, Ltd. ("Teck Cominco") respectfully submits this supplemental brief in response to the brief of the United States as *amicus curiae* filed on November 20, 2007.

That the United States seeks to insulate from review a decision as massively accretive to its jurisdiction as the decision below is unsurprising. "The [Environmental Protection Agency], like most administrative agencies, has looked with favor on the opportunity which the exercise of discretion affords to expand its own jurisdiction." *Great Atlantic & Pac. Tea Co.* v. *Supermarket Equip. Corp.*, 340 U.S. 147, 156 (1950) (Douglas, J., concurring). Tellingly, however, the United States offers *not one word* in defense of the merits of that decision. The United States does not—presumably because it cannot—explain how a *Canadian* company, acting in accordance with *Canadian* law, that disposed of waste only in *Canada* could have "arranged for disposal" of that waste at a "facility" within the *United States*, as CERCLA requires. *See* 42 U.S.C. § 9607(a)(3)-(4); *see also* Pet. 18-21. Nor does it make any effort to reconcile the Ninth Circuit's expansive interpretation of CERCLA with this Court's command that when "[a] statute's language reasonably permits an interpretation" that avoids giving it extraterritorial effect, a court "should adopt it." *F. Hoffmann LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 174 (2004). And nowhere does the United States defend the Ninth Circuit's line-editing of CERCLA's statutory text—inserting, without a trace of embarrassment, an "or" that Congress supposedly forgot—to manufacture an "arranger" liability provision that, countertextually, requires no "arrangement" at all.

With nothing to say in support of the Ninth Circuit's statutory construction, the United States retreats to arguments that this case is an undesirable vehicle for resolving the questions presented and that those questions are unimportant in any event. While the desire of the United States to evade this

Court's review of EPA's unprecedented aggrandizement of authority (and the necessity of taking a position on the merits) may be understandable, its arguments in support of that result are not. The vehicular issues raised by the United States are makeweight, and the questions presented, important at the time the petition was filed, have become no less so in the five months since this Court called for the views of the Solicitor General.

I. THE UNITED STATES' ATTEMPTS TO DEFLECT ATTENTION FROM THE MERITS ARE UNAVAILING

1. The United States contends that EPA's withdrawal of its Unilateral Administrative Order ("UAO") mooted respondents' citizen-suit claims for civil penalties and attorneys' fees and, along with those claims, Teck Cominco's interlocutory appeal from the denial of its motion to dismiss them. The United States is very clearly wrong. Even if respondents' citizen-suit *claims* are moot—and respondents doubtless dispute that premise—Teck Cominco's *appeal* is not.

a. Whatever the merits of the United States' contention that EPA's withdrawal of its UAO mooted respondents' citizen-suit claims, it remains, at this stage in the proceedings, merely the argument of an *amicus curiae*. On the other hand, the decision below, which expressly concluded that the claims "are not moot," Pet. App. 9a n.10, appears to be law of the case. *See, e.g., Old Person* v. *Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002). If that is so, respondents' citizen-suit claims could be dismissed as moot *only* if the decision below first is vacated—a result that would require a grant of certiorari, rather than the denial advocated by the United States.

b. In any event, Teck Cominco's *appeal* is not moot.[1] Teck Cominco's appeal would be moot only if EPA's with-

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[1] Of course, the *case* is not moot, and to the extent the government suggests otherwise (at 7-8), it is wrong. Even on the United States' view, respondents' amended complaint states two "live claims." U.S. Br. 12. Those "remaining live issues supply the constitutional requirement of a case or controversy." *Powell* v. *McCormack*, 395 U.S. 486, 497 (1969).

drawal of its UAO "makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology of Cal.* v. *United States*, 506 U.S. 9, 12 (1992) (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). That bar is not a high one. In *Lopez* v. *Gonzalez*, 127 S. Ct. 625 (2006), this Court agreed with the parties that petitioner's appeal from his deportation order was not mooted by his *volunteering* to be deported. *Id.* at 629 n.2. "Lopez can benefit from relief in this Court," the Court held, because prevailing on his "aggravated felony" contention would enable him to pursue his application for cancellation for removal that would, were the Attorney General to exercise his discretion to grant it, permit petitioner to return to the United States. *Id.*; *see also Lopez* v. *Gonzalez*, No. 05-547, Brief for Respondent (Acquiescence) at 6 n.5 (Jan. 24, 2006).

That Teck Cominco's appeal is interlocutory—and therefore a creature of circumscribed appellate jurisdiction—does not alter the analysis. *See Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 313-18 (1999). In *Grupo Mexicano*, petitioners took an interlocutory appeal from the entry of a preliminary injunction. *Id.* at 313. While that appeal was pending before the Second Circuit, the district court granted summary judgment to respondents and converted the preliminary injunction into a permanent injunction. Notwithstanding the general rule that appeals from preliminary injunctions are mooted by the entry of a permanent injunction, "because the former merges into the latter," the Court held that petitioners' "potential cause of action against the injunction bond preserves our jurisdiction over this appeal." *Id.* at 314.

For Teck Cominco, the benefits of Supreme Court review are far less speculative than a contingent cause of action (sufficient to prevent mootness in *Grupo Mexicano*) or eligibility for discretionary relief from the judgment below (sufficient in *Lopez*). Like respondents' claims for civil penalties, respondents' concededly live cost-recovery and natural-resource-damage claims depend upon a finding that Teck

Cominco is a covered arranger under Section 107(a)(3) and (4) of CERCLA. *See* 42 U.S.C. § 9607(a). The United States does not dispute that a decision in favor of Teck Cominco on either of the questions presented would compel dismissal of all of respondents' claims. Nor does it dispute that, absent review, the decision below will be just as dispositive of petitioner's defense that it is not a "covered person[]" with respect to respondents' live claims as it was with respect to the citizen-suit claims.

Instead, the United States suggests (at 13)—quite disingenuously—that Teck Cominco may have other defenses to respondents' live CERCLA claims.[2] But even if the United States is correct that Teck Cominco has other *merits* defenses available to it, that would not diminish the value of its asserted *jurisdictional* defense—that it is not a covered person under CERCLA. The latter entitles Teck Cominco to immediate dismissal, while the former holds out, at most, the possibility of summary judgment after the completion of discovery. It is too plain for argument that entitlement to dismissal of *all* pending claims constitutes "effectual relief."

Far from a jurisdictional barrier to this Court's review, the United States has identified, at most, an alternative basis upon which this Court might grant Teck Cominco relief from the decision below. Only in an analysis as bizarrely misconceived as the United States' could the presence of an *additional* error itself compel a *denial* of review. If the decision below conflicts with *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation*, 484 U.S. 49 (1987), in the manner the United States suggests, that would militate in favor of a grant of certiorari, *see* S. Ct. R. 10(c), or perhaps, a GVR. *See Dupris* v. *United States*, 446 U.S. 980, 980 (1980) ("Judgment is vacated and the case is remanded to the . . . District Court . . . to consider the question of mootness").

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[2] The United States asserts that Teck Cominco may have a defense to respondents' cost-recovery claims, but identifies no similar defense to respondents' natural-resource-damages claims.

c. But even if the United States were correct that Teck Cominco's interlocutory appeal is moot, the government would be (and is) absolutely wrong to suggest that such mootness would "not necessarily require vacatur of the court of appeals' judgment." U.S. Br. 11. For at least three reasons, vacatur would be required.

First, if Teck Cominco's appeal is moot, then it became so on the day EPA withdrew its UAO, almost a month before the court of appeals entered judgment. The Ninth Circuit thus would have lacked jurisdiction to entertain Teck Cominco's interlocutory appeal. Once noticed, this Court is bound to correct such an error; the fact that Teck Cominco did not seek certiorari on this jurisdictional question is irrelevant. *See Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 72-73 (1997) ("if the . . . lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it").

Second, because only the claims on appeal—but not the underlying case—would be moot, this case would not be controlled by *U.S. Bancorp Mortgage Company* v. *Bonner Mall Partnership*, 513 U.S. 18 (1994). Rather, it would be controlled by *Deakins* v. *Monaghan*, 484 U.S. 193 (1988), where this Court held that "[w]hen a claim is rendered moot while awaiting review by this Court, the judgment below should be vacated with directions to the District Court to dismiss the relevant portion of the complaint." *Id.* at 200. Likewise, in *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981), the Court held that when "one issue in a case has become moot, but the case as a whole remains alive because other issues have not become moot," "the judgment of the Court of Appeals must be vacated." *Id.* at 394. Indeed, this Court has specifically rejected the remedy of dismissal in these circumstances, holding that though it may be "appropriate when an entire case has become moot," dismissal is "inappropriate when only the issues raised on appeal have been resolved." *Crowell* v. *Mader*, 444 U.S. 505, 506 (1980) (per curiam).

Third, to the extent that it is relevant at all, *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), affirmed that, "[w]hen a civil case becomes moot pending appellate adjudication, '[t]he established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *Arizonans for Official English*, 520 U.S. at 71 (quoting *Munsingwear*, 340 U.S. at 39). *Bonner Mall* establishes a narrow exception to that "established practice"—to wit, when the petitioner has procured the mootness of the appeal by "voluntarily forfeit[ing] his legal remedy" through a settlement with the respondent. 513 U.S. at 25. Vacatur may be denied when "[t]he judgment is not unreviewable, but simply unreviewed by [petitioner's] own choice." *Id.* Any fair reading of Teck Cominco's Motion for Judicial Notice demonstrates that Teck Cominco did not intend, by settling with EPA, to moot its appeal of the district court's determination that it is a covered person under CERCLA. Particularly given the possibility that the decision below, if left undisturbed, would be law of the case as to Teck Cominco's liability as an arranger, vacatur is appropriate to "clear[] the path for future relitigation of the issues between the parties." *Munsingwear*, 340 U.S. at 40.

2. This case's interlocutory posture will not undermine this Court's review. The United States speculates that "respondents might argue on remand" that Teck Cominco is covered by CERCLA as "an operator or transporter" and that "it is at least possible that discovery will reveal" evidence to support such a conclusion. U.S. Br. 14. This transparently outlandish conjecture is refuted by respondents' amended complaints, which allege only that Teck Cominco is an arranger, *see* Pakootas' Am. Compl. at 9-11; First Am. Compl. in Intervention 7-8, and the briefs in opposition, which suggested no alternate theory of liability. *See* Rule 15.2. The government's surmise also is refuted by common sense: If the Ninth Circuit's decision that Teck Cominco is a covered "arranger" is allowed to stand, it is difficult to see why respondents would undertake the effort to pursue an alternate

theory on remand. In any event, this Court recently confirmed—at the United States' strong urging—that such speculation as to the evidence that discovery "might" "possib[ly]" reveal is an insufficient basis to deny a motion to dismiss. *See Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955, 1967 (2007).

II. On The Merits, The Decision Below Is Important And Warrants Immediate Review

The United States acknowledges that this case "represents the only time in the 27 years since CERCLA's enactment" that a U.S. court held a foreign person to be a "covered person" under CERCLA based upon its foreign conduct. The government nevertheless maintains that the decision below "lacks sufficient importance to warrant review at this time." U.S. Br. 15, 16. The United States' arguments are unpersuasive.

1. The United States contends (at 15-16) that the first question presented in the petition—whether the Ninth Circuit correctly interpreted CERCLA "to penalize the actions of a foreign company in a foreign country undertaken in accordance with that country's laws" (Pet. i)—is unimportant because it is unlikely to recur. But to prove its point, the government cites only the facts that the question is one of "first impression"—that, until this case, not even EPA had dared to impugn a foreign person under CERCLA for its foreign conduct—and that EPA has now withdrawn that first-of-its-kind order. Even if this Court could locate in this line of reasoning an implicit promise on behalf of the United States that EPA will never again be permitted to use CERCLA to sanction foreign conduct, after this Court's decision in *United States* v. *Atlantic Research*, 127 S. Ct. 2331 (2007), the government could not similarly restrain private CERCLA litigants. If CERCLA reaches foreign disposal conduct, there is no reason to believe that CERCLA potentially responsible parties (PRPs) will exclude foreign persons from their cost-recovery actions. Thus, if the "comity question" is, today, one of "first impression," it will not remain so for long.

The United States next argues that this Court should defer resolving the "comity question" because the Ninth Circuit's result in this case is "consistent with considerations of international comity." U.S. Br. 16. As a threshold matter, the inquiry at this stage in the proceedings is not (as the United States would have it) whether principles of international comity preclude the Ninth Circuit's result, but rather, whether the decision's effects on the harmony of relations—*i.e.*, comity—between the United States and Canada mark this case as one of exceptional importance.[3] The answer to the latter inquiry is clear: Canada took the extraordinary step of filing a brief in this Court to argue that "the Ninth Circuit's decision offends comity." Br. Amicus Curiae Government of Canada 14. The United States' self-serving assertion that the decision below "does not 'threaten[] to disrupt our ties with Canada'" (U.S. Br. 16) is just that. Whatever the United States' view as to whether, on these facts, Canada is justified in being upset by the Ninth Circuit's extraterritorial application of CERCLA, Canada's *actions* fairly indicate its displeasure.

Moreover, the United States' comity analysis fails even on its own terms. The United States says that comity principles do not preclude jurisdiction here because "[p]etitioner's conduct could arguably be analogized . . . to firing a gun across the border." U.S. Br. 17. That is a canard. A foreign person's liability under CERCLA—a statute that supposedly assigns liability without regard to intent or fault—could not possibly turn on whether its foreign disposal conduct was "deliberate" or the domestic effects of that conduct assertedly "direct[] and foreseeabl[e]." *See* 42 U.S.C. § 9607(a). More

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[3] Even at the merits phase, the fact that principles of international law would permit the United States (on its view) to proscribe Teck Cominco's foreign conduct does not answer the question presented in the petition whether the Ninth Circuit correctly interpreted *CERCLA* to sanction foreign conduct. That is a question of statutory construction, informed (but certainly not controlled) by principles of international comity, including the presumption against extraterritorial application of domestic laws.

to the point, though, Teck Cominco did not obtain permits from Canadian authorities to launch bullets or—as hypothesized by the Ninth Circuit at oral argument, missiles—into the United States. Teck Cominco was permitted by Canadian authorities to dispose of ostensibly benign waste into a river in *Canada*. And because Teck Cominco did not "fire[]" "a gun" "across a border," the United States has no basis for distinguishing Teck Cominco's supposed pollution of U.S. soil from that emanating from more "[d]istant sources."[4] U.S. Br. 18. Permitting this question "to percolate" as the United States suggests (at 14-15) will lead only to increased application of CERCLA to foreign disposal conduct and accompanying international discord.

2. With respect to the second question presented—whether the Ninth Circuit erred in concluding that CERCLA's arranger liability provision "does not require the involvement of any 'other party or entity'" (Pet. i)—the United States parrots respondents and argues that the First Circuit's statement that "for arranger liability to attach, the disposal or treatment must be performed by another party or entity," *American Cyanamid* v. *Capuano*, 381 F.3d 6, 24 (1st Cir. 2004), was just "*dictum*." U.S. Br. 19-20. But the United States has no answer whatsoever to Teck Cominco's argument on reply that, under the arranger liability provision, the question whether an alleged arranger must own or possess the waste is inextricably linked to the question whether the disposal or treatment must be performed by another party or entity, and that the answer to both questions turns on how one interprets the key phrase "by any other party or entity."

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[4] The United States suggests that federal courts might decline to "exercise jurisdiction" in cases involving "[d]istant sources" of pollution, and that such *ad hoc* international-comity abstention would provide a sufficient check on the extraterritorial application of CERCLA. U.S. Br. 18. But when this Court confronted the identical argument in the context of the Sherman Act, it forcefully rejected it. *See Empagran*, 542 U.S. at 168 (rejecting international-comity abstention as "too complex to prove workable" as a limitation on extraterritorial application of U.S. law).

Both the First Circuit and the court below recognized as much, and while the First Circuit interpreted "by any other party or entity" to modify the phrase "disposal or treatment," *Am. Cyanamid*, 381 F.3d at 24, the Ninth Circuit considered and rejected that approach, concluding instead that "by any other party or entity" expanded disjunctively the preceding clause, "owned or possessed by such person," and unabashedly inserted an "or" in between the two clauses to accomplish the feat. The Ninth Circuit's holding as to the correct construction of "by any other party or entity" conflicts intractably with the First Circuit's construction of the same statutory phrase. This Court should settle the disagreement as to the meaning of this important federal statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NO. 06-1188

IN THE SUPREME COURT OF THE UNITED STATES

TECK COMINCO METALS, LTD.,

Petitioners,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, AND THE STATE OF WASHINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUPPLEMENTAL BRIEF FOR THE STATE OF WASHINGTON

Respondent State of Washington submits this supplemental brief pursuant to Rule 15(8), to address a new argument raised by Petitioner Teck Cominco Metals, Ltd. (Teck) in its supplemental brief filed December 4, 2007.

Upon invitation from this Court, the United States agrees with Respondents that Teck fails to meet the criteria for review, and that certiorari should be denied. *See* Brief for the United States as Amicus Curiae (U.S. Br.) at 6-7, 14-20. The United States agrees there is no circuit split on the issue of "arranger liability," nor any important federal question that would warrant interlocutory review despite the preliminary posture of this case. *See* U.S. Br. at 6-7, 14-20.

With one exception, Teck's supplemental brief does little more than repeat its past arguments for why this Court should grant review on the merits. However, based on the United States' suggestion that Respondents' citizen suit claims are moot, Teck now argues for the first time that this Court must grant certiorari to correct an error "once noticed" below, and must vacate the decision below. *See* Supplemental Brief of Petitioner (Pet. Supp. Br.) at 2, 4-6. There is no basis for this claim. Neither mootness nor vacatur were questions presented or relief sought in the Petition for a Writ of Certiorari (Petition). Any potential mootness of some of Respondents' claims does not now provide a separate new basis for this Court to grant certiorari, nor would vacatur even be appropriate under the facts. If anything, potential mootness issues serve to highlight the preliminary posture of this case, which the United States agrees "counsels strongly against this Court's review." *See* U.S. Br. at 6.

A. Mootness Was Not A Question Presented In The Petition, And Does Not Now Warrant This Court's Review

In 2003 the Environmental Protection Agency (EPA) issued a unilateral administrative order (UAO) to Teck under Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9606(a), which directed Teck to investigate the contamination it caused in the United States and to evaluate alternatives for cleanup. Pet. App. 68a-99a. Respondents brought this action to enforce the UAO. *See* Pet. App. 105a-119a. After the district court certified the appeal, and one month before the court of appeals issued its decision, Teck and EPA signed a settlement agreement and the UAO was withdrawn. *See* Pet. App. 9a n.10. Although Teck argued to the court of appeals that the enforcement action was not moot,[1] it now asserts—for the first time—that this Court must grant certiorari in order to correct an error "once noticed" below. *See* Pet. Supp. Br. at 5. Then, Teck argues, this Court must vacate the decision below since the court of appeals determined that at least two of Respondents' claims were not moot and issued a decision on the merits. *See* Pet. Supp. Br. at 2, 4-6.

There is no basis for Teck's claim. First, the possibility that Respondents' enforcement action is moot is not an independent basis to grant the Petition. If this Court grants review in a case, it will take notice of defects in jurisdiction. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997). However, this Court does not ordinarily grant review simply to correct lower court errors—jurisdictional or otherwise. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted

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[1] *See* Pet. App. 9a n.10 (noting the parties' positions on this point).

error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Teck's Petition does not set forth adequate grounds to justify granting it. Teck's eleventh hour claim on mootness cannot bootstrap the case into being worthy of certiorari.

Second, Respondents were not party to the separate settlement reached between EPA and Teck, which exists outside the context of this litigation. *See* Pet. App. 9a n.10. The effect of this separate agreement and of EPA's withdrawal of its UAO on the enforcement action is factually complex. Given this complexity, the parties disagreed below on the effect of these events on the enforcement action, but did agree that claims for penalties and fees at minimum were not automatically moot. *See* Pet. App. 9a n.10. The court below did not err in reaching this same conclusion at the urging of all parties. It is possible that subsequent fact-finding below could support a claim for penalties and fees. *See Friends of the Earth v. Laidlaw*, 528 U.S. 167 (2000).[2]

The United States did not participate below. Its suggestion that there is no possibility for an award of penalties is based on its own factual statements analyzing the terms of EPA's settlement with Teck and weighing the likelihood that violations could recur. *See* U.S. Br. at 10-11. Notably, the terms of the settlement agreement

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[2] The Defendant in *Laidlaw* took voluntary action to comply with a permit and then closed the facility subject to the citizen suit, but this Court still noted the suit was not moot unless "one or the other of these events made it *absolutely clear* that [Defendant's] permit violations could not be reasonably expected to recur," and left open for consideration on remand what effect these events had on the prospect of future violations because it was a disputed factual matter that had not been aired in the lower courts. *Laidlaw*, 528 U.S. at 193-194 (emphasis added).

are not part of the record before this Court on review.[3] The inquiry regarding the effect of the separate settlement and withdrawal of the UAO goes to whether penalties and fees should be awarded under the facts of the case, which may be in dispute and which have not yet been aired below. It would be remarkable for this Court to resolve the factual questions involved in this issue in the first instance based on the factual representations of an amicus curiae—even the United States.

Third, even though the United States suggests that the enforcement action may be moot, the United States argues *against* certiorari being granted and consequently—assuming Respondents even continue their claims for penalties and fees below—the district court can best explore these facts in the first instance to determine whether they warrant any relief.

In short, the fact that potential mootness was not a question presented in the Petition and is predicated upon events requiring factual inquiry, further highlights the need for subsequent proceedings below and counsels against review at this level now. *See* U.S. Br. at 6 (agreeing that "[t]he current posture of this case therefore counsels strongly against this Court's review").

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[3] Although the court below took judicial notice of the fact the agreement had been reached, it declined to take notice of any supplemental argument relating to the terms of that agreement. Pet. App. 9a n.10. Likewise, Respondents' amended complaints (upon which Teck relies to argue that its "appeal" is not moot even if the citizen suit claims are, *see* Pet. Supp. Br. at 2-4) are not part of the record before this Court. *See* Pet. App. 9a n.10.

B. Vacatur Is An Extraordinary Remedy That Would Not Be Warranted In Any Event

Following the United States' view that certiorari should be denied, Teck now switches track to argue for the first time that the decision below must be vacated. *See* Pet. Supp. Br. at 4-6. Teck contributed to any potential mootness, however, and its desire to avoid an unfavorable decision does not justify the extraordinary remedy of vacatur.

The underlying basis for a request for vacatur should be considered in light of both equity considerations and the public interest. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22-27 (1994) (clarifying the *Munsingwear* standard for when a lower court decision should be vacated based on mootness). The "principal condition to which [this Court] look[s] is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.* at 24. If so, "denial of vacatur is merely one application of the principle that '[a] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks'," and the request should be denied unless exceptional circumstances exist because both a failure of equity and the public interest weigh against it. *See id.* at 24-29 (citation omitted) (noting that judicial precedents are presumptively correct and are not merely the property of private litigants).

Teck cites *Deakins v. Monaghan*, 484 U.S. 193 (1988), and other cases that address the extent to which decisions below should be vacated, but misconstrues the real question of when vacatur is even warranted. *See* Pet. Br. at 5-6. In *Deakins* this Court vacated *in part* the decision below, but did so based on circumstances entirely distinguishable from this case. *See Deakins*, 484 U.S. at 199-201. Only that portion of the decision below finding the district court need not have abstained from hearing respondents' equitable claims for relief regarding the

illegal seizure of business documents in a state criminal investigation was vacated, and the case was remanded with instructions to dismiss those claims with prejudice, because this Court wanted to ensure that respondents could not renew these claims in federal court after representing they would permanently withdraw their claims and go seek relief in state court.[4]

There is no such basis for vacatur here. Teck argues it did not intend to moot its own appeal, and that vacatur is appropriate so it can avoid an unfavorable interlocutory decision on liability. *See* Pet. Supp. Br. at 6. This argument is unavailing. Although the United States cites withdrawal of the UAO as the allegedly mooting event, this event was predicated upon the separate settlement reached between Teck and EPA. *See* U.S. Br. at 4, 10. That Teck played an active role in these events cannot be denied, despite Teck's disclaimer of any unintentional effect in undermining its own appeal.

Moreover, Teck took the position before the court of appeals that the enforcement action was not moot. *See* Pet. App. 9a n.10. Teck now collaterally attacks the decision below, merely to avoid being bound if it fails to secure review on the merits. Teck's self-interest does not constitute an exceptional circumstance warranting vacatur, however, and Teck should not be allowed to subvert the appellate process to its own advantage. *See Bonner Mall*, 513 U.S. at 27 ("To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the

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[4] Notably, this Court distinguished the *Deakins* case from one in which a petitioner voluntarily ceases its challenged conduct but may nevertheless "return to his old ways," because the Court had the power to guarantee that the feared conduct (the pursuit of the federal litigation) could not resume. *See Deakins*, 484 U.S. at 201 n.4. No similar "guarantee" exists in this case.

judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system.").

C. Conclusion

For the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari.

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IN THE

Supreme Court of the United States

TECK COMINCO METALS, LTD., a Canadian corporation,

Petitioner,

v.

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; STATE OF WASHINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS PAKOOTAS AND MICHEL

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Respondents, Joseph Pakootas and D.R. Michel, concur with the view of the United States that the current posture of this case "counsels strongly against this Court's review." Brief for the United States as Amicus Curiae ("Brief of the United States") at 6. Respondents submit this brief pursuant to S.Ct. Rule 15.8 for the sole purpose of commenting on the mootness and vacatur issues discussed in the Brief of the United States.

A suggestion of mootness at this stage is anomalous because petitioner, Teck Cominco Metals, Ltd. ("TCM"), has not claimed that its agreement with the Environmental Protection Agency ("EPA") moots this appeal. Instead, TCM advised the court of appeals that "claims for civil penalties under CERCLA 'for each day' of violation of the Unilateral Administrative Order are not moot . . . [and] claims for attorneys' fees in trying this lawsuit are not moot. . . ."[1] As no court has analyzed TCM's agreement with EPA or considered its effect on this citizen suit, any mootness concerns should be considered by the district court after remand. The petition for Writ of Certiorari should be denied.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondents' complaint sought declaratory and injunctive relief under CERCLA based on TCM's failure to comply with the unilateral administrative order ("UAO") issued by EPA on December 11, 2003. Pet. App. 6a, 105a-12a. Their complaint also sought an order requiring the payment of civil penalties to the maximum extent permitted by CERCLA "for each day during which the violation of the UAO continues," pursuant to 42 U.S.C. § 9659(c) and recovery of attorneys' fees pursuant to 42 U.S.C. § 9659(f). Pet. App. 111a.

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[1] Petitioner's Request for Judicial Notice, Ninth Circuit Court of Appeals ("Pet. C.A. Request for Judicial Notice") <http://www.law.washington.edu/ Directory/docs/Robinson-Dorn/Trail Smelter> at 5.

Neither the United States nor TCM has argued that respondents lacked standing to sue or that they failed to meet the requirements for a citizen suit stated in 42 U.S.C. § 9659. As the United States recognizes and TCM does not dispute, TCM did not comply with the UAO. Brief of the United States at 3, Pet. App. 5. TCM has never complied with the UAO. Instead, it moved to dismiss respondents' complaint alleging lack of subject matter and personal jurisdiction and failure to state a claim, pursuant to Federal Rules of Civil Procedure 12(b)(1), (2) and (6). Pet. App. 30a. After the district court denied that motion, Pet. App. 29a-59a, and oral argument on its appeal, TCM negotiated an agreement with EPA. Pet. App. 9a n.10. Respondents are not parties to that agreement and it does not purport to release the claims that respondents allege in their citizen suit.[2] Instead, it provides for implementation of a remedial investigation and feasibility study (RI/FS) patterned on the UAO, but which explicitly disclaims compliance with an "administrative or judicial order issued pursuant to the provisions of CERCLA . . ."[3] Pet. C.A. Request for Judicial Notice, Ex. 2, at 1, 3 (June 2, 2006).

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[2] CERCLA authorizes the United States to intervene in this citizen suit, 42 U.S.C. § 9659(g), but it has never done so. Nor did it file suit against TCM or negotiate a judicial order requiring TCM to comply with the UAO or otherwise comply with CERCLA.

[3] The settlement agreement is structured like a CERCLA order but stripped of its CERCLA grounding. Settlement Agreement at 1-29. A comparison of the settlement agreement's Statement of Work (SOW) with the original UAO's SOW reveals that the settlement agreement includes similar components as the UAO. *Id.*, Ex. A at 1-49 (June 2, 2006) (Statement of Work for Remedial Investigation and Feasibility Studies Upper Columbia River Site); Petitioner's Memorandum in Support of Motion to Dismiss, with Exhibits, Ex. A at 58-77 <http:// www.law.washington.edu/ Directory/docs/Robinson-Dorn/ Trail Smelter>.

As a part of its agreement, EPA agreed to withdraw the UAO and covenanted "not to sue or to take administrative action against TCM and TCAI[4] pursuant to Sections 106 and 107(a) of CERCLA, . . . for non-compliance with the Unilateral Administrative Order. . . ."[5] *Id.* at 22, 55. This promise was expressly conditioned on "the satisfactory performance by TCAI and TCM of their obligations under" the agreement. *Id.* The settlement agreement did not purport to release any claims for past non-compliance with the UAO and it did not purport to terminate the pending citizen suit. Nor did EPA promise to take any action to accomplish termination of the pending citizen suit. Indeed, the agreement expressly rejected its application to the rights of third parties. *Id.* at 26, ¶74.

As TCM concededly did not comply with the UAO, and it did not reach agreement with the EPA until 892 days after suit was filed, daily penalties for non-compliance with the UAO could be awarded under 42 U.S.C. § 9659(c). At the maximum rate of $27,500 per day, 42 U.S.C. § 9606(b)(1) and 40 CFR 19.4, TCM is potentially liable for penalties totaling $24,530,000. If penalties are awarded by the district court for non-compliance with the UAO, respondents will seek recovery of their attorneys' fees and costs as authorized by 42 U.S.C. § 9659(f).

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[4] TCAI is Teck Cominco American Incorporated, an affiliate of TCM.

[5] Any compromise of a unilateral administrative order to conduct an RI/FS under CERCLA is subject to 42 U.S.C. § 9622(d)(3) and is to be implemented by administrative order or decree in the district court. EPA did not follow these procedures, evidently concluding that it was not resolving any claims under CERCLA.

After it reached agreement with the EPA, TCM did not ask the district court or the appellate court to dismiss this citizen suit on mootness grounds. Instead, TCM asked the Ninth Circuit to take judicial notice of the settlement agreement and represented that the appeal was not moot. Pet. C.A. Request for Judicial Notice, Pet. App. 9a, n.10. It claimed that the settlement agreement mooted the injunctive and declaratory relief claims but stated its understanding that its agreement with EPA did not moot the statutory penalties and attorneys' fees claims. *Id.*

DISCUSSION

A. Post-Suit Withdrawal Of The UAO In A Non-CERCLA Agreement Does Not Automatically Moot Respondents' Citizen Suit, And Application Of This Court's Mootness Principles Requires Remand To The District Court For Factual Inquiry.

CERCLA authorizes respondents to commence a civil action against TCM based on its violation of an "order which has become effective" at the time of suit. 42 U.S.C. § 9659(a)(1). Such right to commence suit is conditioned on notice pursuant to subpart (d)(1) and the absence of diligent prosecution by the government as provided in subpart (d)(2). As TCM's non-compliance is conceded and diligent prosecution is not alleged, respondents not only had standing to sue when they filed, TCM had no colorable defenses except the arguments it made—the court lacked subject matter and personal jurisdiction and CERCLA did not apply to an entity located in and operating in Canada.

The United States now suggests that its withdrawal of the UAO after TCM's non-compliance and unsuccessful challenge to the application of CERCLA, deprives respondents of a case or controversy because "petitioner is no longer violating [the order]." Brief of the United States at 8-9. This argument is not anchored in the text of CERCLA and does not distinguish

between a claim that has been potentially limited by subsequent developments and one that is no longer "live."[6] Withdrawal of the UAO may limit the district court's power to grant an injunction enforcing it, but does not, of itself, eliminate the court's power to order statutory penalties for the period of non-compliance. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). TCM recognized this when it told the Ninth Circuit that neither the penalties claim nor the attorneys' fees claim was moot. The United States cites no authority suggesting that the district court lacks jurisdiction to award penalties based on non-compliance with an order that was subsequently withdrawn; thus, it is not self-evident, as the United States has implied, that respondents' claims are moot.[7]

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[6] The United States discussed standing principles from *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), and *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). Brief of the United States at 8-10. Standing is not controverted here, and standing jurisprudence does not answer whether certain forms of relief remain available for post-filing violations. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-92 (2000) (distinguishing standing and mootness in voluntary compliance cases).

[7] As the United States agrees that there has been no voluntary compliance with the UAO by TCM that might have squarely placed these issues under *Laidlaw*, this Court's landmark voluntary compliance opinion, Brief of the United States at 10, there is a question of the applicable mootness standard to apply. The United States assumes that *Laidlaw* applies, reasoning backward from the proposition that in a voluntary compliance case penalties must deter future violations to conclude that claims for penalties can also be mooted in non-voluntary compliance cases. Reliance on *Laidlaw's* voluntary compliance analysis does not help in the instant case where TCM adamantly refused to comply with the order in question.

Contrary to the United States' assumption that the *Laidlaw* standard applies, withdrawal of the UAO, like repeal of a statute, does not deny the Court jurisdiction to decide whether relief should issue. *Coral Constr. Co. v. King County*, 941 F.2d 910, 927 (9th Cir. 1991) (citation omitted). When mootness is alleged in such circumstances, the court retains the power to decide the legality of the practice and whether relief should issue. *Mesquite*, 455 U.S. at 289.

Rather, the undeveloped status of the complex factual record giving rise to mootness allegations is best suited for resolution at the trial court. *See, e.g., Laidlaw*, 528 U.S. at 193-94 (remanding because the facts informing the mootness question "have not been aired in the lower courts; they remain open for consideration on remand"); *Mesquite*, 455 U.S. at 289 n.10 (it was a matter for the trial judge whether likelihood of further violations was sufficiently remote to make injunctive relief unnecessary); *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199 (1968) (same).[8] This is so because the alleged mooting event is not simply the withdrawal of the UAO, as the United States suggests. Brief of the United States at 10. Instead, the potentially mooting event is the agreement between TCM and EPA, a 29-page document setting out the structure of a CERCLA-like RI/FS, relied upon by EPA as the basis for withdrawing the UAO. Settlement Agreement at 1-29. The United States has not cited authority suggesting that non-judicial action terminates a validly filed citizen suit.[9] But, even if the agreement to withdraw the UAO operates to moot injunctive relief, the district court must determine how, if at all, the settlement agreement applies to the remaining claims for

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[8] The lower courts also recognize that the determination of whether a citizen suit's claims for civil penalties have become moot is a highly factual inquiry. *See, e.g., Ass'n of Irritated Residents v. Fred Shakel Dairy*, 460 F. Supp. 2d 1185, 1192 (E.D. Cal. 2006) (In a Clean Air Act case, the effect of compliance and closure of a facility on civil penalties claims in a citizen suit was a "disputed factual matter"); *Natural Res. Council of Me. v. Int'l Paper Co.*, 424 F. Supp. 2d 235, 257 (D. Me. 2006) (In a Clean Water Act case, the court noted that at an early stage of litigation, "without any further information," it could not determine whether civil penalties claims had become moot).

[9] While separate adjudications have terminated citizen suits under *res judicata* principles, *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 472-74 (6th Cir. 2004), respondents are aware of no case in which a citizen suit, properly filed, has been terminated by non-judicial action. Nothing in the text of CERCLA authorizes termination of the suit in these circumstances.

penalties and fees—a question on which TCM and the United States evidently disagree. In addition to determining whether penalties should be awarded based on pre-withdrawal non-compliance, analysis of the agreement and its implementation is necessary to judge whether penalties would influence TCM's performance of the settlement agreement (necessary to prevent rescission of the UAO withdrawal) and deter other non-compliance with CERCLA.[10]

As part of its mootness argument, the United States suggests that EPA's covenant not to sue in the settlement agreement waived or released respondents' claim for penalties stated in the pending citizen suit. Brief of the United States at 11. EPA evidently did not intend to waive respondents' claims as the settlement agreement expressly excludes impact on the rights of third parties. Settlement Agreement at 26, ¶74. That provision recognizes the fact that respondents were not party to the agreement and EPA was not purporting to act on their behalf. In any event, waiver is an affirmative defense that might be alleged in the district court, not a ground for mootness. *See, e.g., Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664, 665-66 (9th Cir. 1997) (recognizing that waiver is an affirmative defense that must be pleaded in an answer).

B. EPA's Agreement With TCM Does Not Raise A *Res Judicata* Bar To This Suit; Any Claim To The Contrary Must Be Evaluated By The District Court On Remand.

Within its mootness discussion, the United States briefly addresses the principles of *res judicata*, asserting that *res judicata* operates to "bar" respondents' citizen suit claims. Brief of the United States at 11. Although courts have occasionally applied *res judicata* principles to determine the

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[10] The deterrence and compliance calculus is complicated by the fact that TCM did not undertake performance of the RI/FS described in the settlement agreement. That responsibility was allocated to TCAI, TCM's American affiliate.

effect of a post-filing settlement, *see, e.g., Ellis*, 390 F.3d at 472-74, *res judicata* does not preclude litigation unless the prior action ended with a "final judgment on the merits" involving the same parties or their privies. *See, e.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

The two cases cited by the United States to support its view do not help overcome the absence of judicial resolution here. *Ellis*, 390 F.3d 461; *EPA v. City of Green Forest*, 921 F.2d 1394, 1403-04 (8th Cir. 1990), *cert. denied*, 502 U.S. 956 (1991). In both *Ellis* and *Green Forest*, the settlement alleged to have preclusive effect was the result of a judicial process in which the citizen suit plaintiffs either participated as intervenors or had an opportunity to comment on the proposed settlement. *Ellis*, 390 F.3d at 472-74; *Green Forest*, 921 F.2d at 1402. In contrast, here, respondents had no opportunity to participate directly in the extra-judicial settlement negotiations and no judgment was entered.

C. Even If This Court Deems Respondents' Claims Moot, It Should Not Vacate The Ninth Circuit Opinion.

Vacatur is a doctrine grounded in the principles of equity. *See U.S. Bancorp Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994) ("the determination [of whether to vacate] is an equitable one"). This Court vacates a lower court opinion when mootness arises in one of two circumstances: when mootness arises by "happenstance," *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950), or when the prevailing party below takes voluntary action to moot the claim, effectively preventing appeal. *See, e.g., Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944) (vacating lower court opinion was the "just and appropriate disposition" after prevailing party, a corporate entity, dissolved before its favorable judgment could be reviewed; Court vacated and remanded to allow losing party to pursue the corporate entity's successors). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997) ("It would certainly be a strange doctrine that would permit a plaintiff to obtain a

favorable judgment, take voluntary action [that] moot[s] the dispute, and then retain the [benefit of the] judgment") (agreeing with the Brief of the State of Arizona) (alterations in original).[11] Neither justification for vacatur applies here, and vacation of the Ninth Circuit opinion would work directly *against* the equitable principles that the vacatur doctrine seeks to protect.

The primary purpose of vacatur is to protect the losing party from being prejudiced by a decision that might have been overturned on appeal. *See Munsingwear*, 340 U.S. at 40. There is no such concern here where TCM—the losing party on the issue appealed from the district court—first deliberately entered into a non-CERCLA settlement agreement without the participation of respondents, and then urged to the Ninth Circuit that the settlement agreement had not mooted respondents' claims for civil penalties and attorneys' fees. *Cf. Bonner Mall*, 513 U.S. at 28 (criticizing a vacatur theory that would encourage "the lack of equity of a litigant who has voluntarily abandoned review").[12] This Court has expressly established that vacatur is not appropriate where the appellant has voluntarily mooted the appeal, including by settlement. *Bonner Mall*, 513 U.S. at 24. *See also Laidlaw*, 528 U.S. at 194 n.6 (even if polluter's voluntary compliance mooted the citizen suit, it would be "far from clear" that vacatur would be the appropriate response).

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[11] This Court's opinions in *Deakins v. Monaghan*, 484 U.S. 193 (1988); *Univ. of Texas v. Camenisch*, 451 U.S. 390 (1981); and *Crowell v. Mader*, 444 U.S. 505 (1980); all inform that when only portions of a plaintiff's lawsuit have become moot, only the moot portions should be vacated. These opinions do not provide an additional basis for exercising the equitable doctrine of vacatur; they merely instruct *how much* of an opinion should be vacated when this Court determines that vacatur is warranted.

12. Nor is *Munsingwear's* concern regarding the foreclosure of opportunity for review presented here. *See Munsingwear*, 340 U.S. at 38. No judgment was entered below, and nothing precludes TCM from again seeking review in this Court should the applicability of ~~C~~ERCLA to TCM remain an issue in this case after remand.

"The denial of vacatur is merely one application of the principle that '[a] suitor's own conduct in relation to the matter at hand may disentitle him to the relief he seeks.'" *Bonner Mall*, 513 U.S. at 25 (denying requested vacatur because the prevailing party voluntarily mooted the subject of the appeal through settlement, precluding further review) (citation omitted). Thus, there is no application here for *Munsingwear*'s observation that when mootness arises through *happenstance* vacatur beneficially "clears the path for future relitigation of the issues between the parties." *Munsingwear*, 340 U.S. at 40. This Court has determined that when a party voluntarily moots a claim, the benefits of preserving the lower court's opinion outweigh any potential benefits of relitigating the same issues. *Cf. Bonner Mall*, 513 U.S. at 27 ("The value of additional intra-circuit debate seems to us far outweighed by the benefits that flow to litigants and the public from the resolution of legal questions") (emphasis added).

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TECK COMINCO METALS, LTD.,
Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, AND STATE OF WASHINGTON,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

At the core of this case is the question whether Congress intended CERCLA to apply to and sanction acts of transboundary pollution. Particularly in the wake of this Court's recent ruling that greenhouse gases are "air pollutants," *Massachusetts* v. *EPA*, 127 S. Ct. 1438, 1460 (2007), that question is undeniably and exceptionally important. By extending CERCLA's "responsible party" status—for the first time—to an entity that disposed of waste outside the United States, the decision below: (1) threatens to upset a longstanding tradition of resolving disputes over transboundary pollution diplomatically rather than judicially; (2) disregards this Court's decisions establishing the presumption against extraterritorial application of U.S. law; and (3) adopts a construction of CERCLA that directly conflicts with other federal appellate decisions. Each of these untoward results is a sufficient basis for a grant of certiorari.

1. Respondents are quick to dismiss the United States' and Canada's long history of resolving issues of transboundary pollution through nation-to-nation negotiations and cooperation. Indeed, respondents reduce the cornerstone of this extensive diplomatic practice, the 1909 Boundary Waters Treaty, to little more than a historical curiosity. Respondents suggest that CERCLA has "render[ed] the treaty null," Br. in Opp. of Washington 21 n.18, or, at least, "literally beside the point." Br. in Opp. of Pakootas 17.

The demise of the Boundary Waters Treaty no doubt comes as a surprise to at least one of the treaty's two signatory nations, *see* Br. of *Amicus Curiae* Canada 7 (arguing that the Boundary Waters Treaty "plainly applies in this case"), and to the Province of British Columbia, which has entered into several similar environmental cooperation agreements with neighboring States, *see* Br. of *Amicus Cu-*

riae British Columbia 13-14.[1] Respondents nevertheless deny that the decision below signals any dramatic shift from how transboundary pollution issues historically have been resolved, suggesting that "litigation has often been a means for addressing transboundary pollution between the United States and Canada." Br. in Opp. of Washington 20. That parties may have resorted on occasion to litigation to address sundry transboundary pollution problems, however, is—to use respondents' words—"literally beside the point." The question is not, as respondents frame it, whether the Boundary Water Treaty "[p]reclude[s]" the application of U.S. environmental laws. Br. in Opp. of Washington 18. It does not. The question presented, instead, is whether, given the long tradition of resolving transboundary pollution problems through diplomatic channels, CERCLA ought to be interpreted to include within "responsible parties" those whose disposal activities occur only outside the United States.

To the extent the authorities cited by respondents shed any light at all on *that* question, they tend to bolster, rather than undermine, the proposition that environmental laws should be stretched to reach transboundary pollution problems, if at all, only at the specific direction of Congress. For example, in *Ohio* v. *Wyandotte Chemicals Corporation*, 401 U.S. 493 (1971), this Court *declined* to exercise jurisdiction over a state-law nuisance abatement suit brought by the State of Ohio against out-of-state entities, including one Canadian corporation. *Id.* at 494-95. The Court pointed to the "sense of futility that has accompanied this Court's attempts to treat with the complex technical and political matters that inhere in all disputes of the kind at hand." *Id.* at 502. Noting that "many competent adjudicatory and conciliatory bodies are actively grappling with [the problem] on a more practical ba-

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[1] Just two years before CERCLA's enactment, Congress recognized "a tradition of cooperative resolution of issues of mutual concern . . . in the environmental area." United States-Canadian Negotiations on Air Quality, Pub. L. No. 95-426, 92 Stat. 963, 990 (1978).

sis," this Court declined to "commit [its] resources to the task of trying to settle a small piece of a much larger problem." *Id.* at 503. When, on the other hand, courts have entertained litigation over transboundary pollution issues, it typically has been at the specific direction of Congress. *See, e.g., Her Majesty the Queen in Right of Ontario* v. *EPA*, 912 F.2d 1525 (D.C. Cir. 1990) (addressing Ontario's claim under Section 115(c) of the Clean Air Act, which requires EPA to take action when air pollutants may potentially cause injury in a foreign country).

2. Respondents contend that the well-established presumption against extraterritorial application of U.S. law has no application here because (a) the Ninth Circuit's application of CERCLA to Teck Cominco is purely domestic, and (b) the presumption does not apply where U.S. law addresses the domestic effects of foreign conduct. Both contentions are deeply flawed.

a. The private respondents maintain that "CERCLA liability is triggered not by any 'conduct' with respect to hazardous substances but by the 'release' of those substances into the 'environment.'" Br. in Opp. of Pakootas 10. Indeed, in respondents' view, under "CERCLA's sweeping, strict liability scheme," "'[c]onduct'" is not "even *necessary* to impose liability under CERCLA." *Id.* at 9, 10 (emphasis added). Respondents contend that because the CERCLA "facility" and "release" are in the United States, and Teck Cominco's conduct in Canada is irrelevant to its CERCLA liability, the Ninth Circuit applied CERCLA only domestically.

The key premise of respondents' "domestic application" argument—that conduct is completely irrelevant to CERCLA liability—is flatly contradicted by the text of the statute. Contrary to respondents' characterization of CERCLA, that statute does not simply impose liability in the abstract whenever there is a "release." CERCLA instead focuses on "covered persons," 42 U.S.C. § 9607, imposing liability only on

those who "own[ ]" or "operate[ ]" CERCLA facilities, and those who "arrange[ ] for disposal" of or otherwise "transport" hazardous waste. *Id.* § 9607(a). Without that conduct—owning, operating, arranging, or transporting—there can be no CERCLA liability. The release thus is a necessary but not a *sufficient* precondition to CERCLA liability; there must be conduct that converts one into a "covered person." Under the arranger liability provision, 42 U.S.C. § 9607(a)(3), there must be disposal by arrangement.

Here, it cannot be seriously disputed that the "disposal" activities took place entirely within Canada. *See, e.g.*, Br. in Opp. of Pakootas 8 (acknowledging petitioner's "discharge of hazardous substances into the river in Canada"); *see also* Pet. App. 107a, 115a (operative complaints alleging that the waste was "carried downstream into waters of the United States"). That was the factual predicate for the Unilateral Administrative Order ("UAO") underlying respondents' claims, *see* Pet. App. 72a ("Effluent, such as slag, was discharged into the Columbia River through several outfalls at the Trail Smelter"), and for both decisions below, Pet. App. 16a, 51a.[2]

Undaunted by the decisions below or even their own pleadings, the private respondents advance the novel contention that Teck Cominco's "act of 'disposal' continued" after the initial discharge in Canada "until the contaminants came

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[2] The private respondents assert that Teck Cominco has never before argued that its disposal activities "occurred exclusively in Canada." Br. in Opp. of Pakootas 12. That assertion is absolutely false. *See, e.g.*, Teck Cominco's Mem. in Supp. of Mot. to Dismiss at 30 ("The only activity alleged as giving rise to TC Metals' liability took place through the alleged disposal of metal-bearing slag into the Columbia River. That activity occurred exclusively in Canada."). Indeed, in unsuccessfully opposing Teck Cominco's petition for permission to appeal under 28 U.S.C. § 1292(b), respondents themselves observed that Teck Cominco's motion to dismiss was predicated on the fact that the "slag it discharged into the Columbia River w[as] discharged in Canada." Resp. C.A. Answer to Pet. for Permission to Appeal at 5.

to rest . . . in the United States." Br. in Opp. of Pakootas 13. But, as shown above, respondents' newly-minted legal theory was not the factual predicate for the UAO, respondents' operative complaints, or the decisions below. And with good reason: At the time of the issuance of the UAO, binding Ninth Circuit authority made absolutely clear that CERCLA's definition of "disposal" does not include passive migration of hazardous substances. *See Carson Harbor Vill., Ltd.* v. *Unocal Corp.*, 270 F.3d 863, 879 (9th Cir. 2001) (terms defining disposal "generally connote active conduct"). It is thus unsurprising that, in the courts below, while both respondents argued that Teck Cominco had caused a CERCLA "release" from a "facility" in the United States, neither respondent even remotely suggested that Teck Cominco had disposed of waste anywhere other than in *Canada*. *See, e.g.*, Pakootas C.A. Br. 11 (Teck Cominco "discharged hazardous substances into the river in British Columbia").

b. Respondents further contend that the presumption against extraterritoriality has no effect on CERCLA because the presumption does not apply when a statute seeks to remediate domestic harms. Br. in Opp. of Pakootas 20. But this Court has never adopted so limited a view of the presumption against extraterritoriality, and, indeed, has very recently rejected it.

In *Microsoft Corporation* v. *AT&T Corp.*, 127 S. Ct. 1746 (2007), this Court applied the presumption against extraterritoriality in interpreting 35 U.S.C. § 271(f), which makes it an act of infringement to export the components of a patented invention for assembly abroad. The statute had been enacted to provide patent holders a remedy against foreign acts of infringement of their U.S.-issued intellectual property. Even though the statute sought to redress domestic injuries caused by foreign acts, the Court nevertheless found applicable "[t]he presumption that United States law governs domestically but does not rule the world." *Microsoft*, 127

S. Ct. at 1758. Indeed, in the rare instances where this Court has found that "domestic effects" precluded the application of the presumption against extraterritoriality, "it has done so because it concluded that there existed an affirmative congressional decision to allow such extraterritorial application." Br. of *Amicus Curiae* Chamber of Commerce of the United States 5 (citing *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 & n.22 (1993), and *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 285, 287 (1952)).

In a similar vein, respondents suggest that the presumption is limited to circumstances where there exists a "clash of laws" of separate sovereigns. *See* Br. in Opp. of Washington 23; Br. in Opp. of Pakootas 18. The private respondents go so far as to suggest that Justice Holmes's admonition in *American Banana Company* v. *United Fruit Company*, 213 U.S. 347 (1909), that the presumption applies to avoid "interference with the authority of another sovereign," *id.* at 356, "has been *repudiated*" by this Court's subsequent cases. Br. in Opp. of Pakootas 19 (emphasis added). This, of course, is not the case. Far from repudiating Justice Holmes's view of the presumption, in *F. Hoffmann-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004), this Court confirmed that it applies to "avoid unreasonable interference with the sovereign authority of other nations." *Id.* at 164.[3]

Here, there can be no doubt that the Ninth Circuit's imposition of CERCLA liability on Teck Cominco interferes with the sovereign authority of Canada and the Province of British Columbia. Canada has repeatedly expressed its growing dismay at EPA's attempts to regulate Canadian conduct,

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[3] The State of Washington concedes as much. Br. in Opp. of Washington 26 ("The proposition is true"). And rightly so, for if this were not the case, this Court's application of the presumption to the question whether the Federal Tort Claims Act encompassed torts committed in Antarctica would be nonsensical; there is no law of Antarctica with which U.S. law could directly conflict. *Smith* v. *United States*, 507 U.S. 197, 198, 203-04 (1993).

sending a diplomatic note to the State Department protesting the issuance of the UAO, Pet. App. 100a-101a, and now, in this Court, stating that "the Ninth Circuit's decision nevertheless subjects Canadian companies, such as Petitioner, to conflicting regulatory schemes and infringes Canada's strong sovereign interest in regulating its own corporate citizens." Br. of *Amicus Curiae* Canada 12. British Columbia echoes the sentiment, observing that "[t]here is nothing in the Court of Appeals' opinion that would preclude the application of American law to thousands of other entities whose activities take place entirely within British Columbia and are subject to provincial regulation." Br. of *Amicus Curiae* British Columbia 17. The Ninth Circuit thus departed radically from this Court's cases in failing to apply the presumption against extraterritorial application of U.S. law.[4]

The presumption against extraterritoriality commands reversal of the decision below. This Court has explained that a court "*must* accept" any "reasonably permi[ssible]" reading

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[4] Respondents persistently suggest that EPA's issuance of the UAO demonstrates that the President shares their disregard for the sovereign interests of Canada and British Columbia. But the Executive's decision to take no action to enforce the UAO, and the subsequent decision to withdraw it, Pet. App. 120a, at least raise the question whether the President came to believe that EPA's initial issuance of the UAO was in error. The Court can resolve that question easily enough by calling for the views of the Solicitor General. The Solicitor General recently filed a brief stressing the President's authority to "promote the effective conduct of foreign relations, and underscore the United States' commitment in the international community to the rule of law" Br. for the United States as *Amicus Curiae*, *Medellin* v. *Texas*, No. 06-984, at 8; *see also id.* at 10 (the President has a "unique role in foreign affairs," and exercises "traditional authority in judicial proceedings implicating international law"); *id.* at 12 (The "President is uniquely positioned both to evaluate and resolve sensitive foreign policy issues and to act with dispatch"). The Solicitor General also contended that a judicial decision "effectively frustrating efforts to comply with international treaty obligations clearly warrants this Court's review." *Id.* at 8-9. The Court granted review in *Medellin*. 75 USLW 3398 (Apr. 30, 2007). Review is also warranted in this case.

of the statutory language that will avoid the extraterritorial application of U.S. law. *Empagran*, 542 U.S. at 174. In the petition, Teck Cominco explained that Section 9607(a)(3) must be read in conjunction with Section 9607(a)(4) and that, accordingly, CERCLA's arranger liability provision requires that the disposal occur at the same facility from which there is a release. Pet. 18-21. Respondents have no answer whatsoever to that argument other than to complain they have not before heard it articulated in precisely that fashion. Br. in Opp. of Pakootas 11; Br. in Opp. of Washington 14-15. But from the outset of the litigation, Teck Cominco has argued that it cannot be held liable as an arranger, *see* Mot. to Dismiss 29-31, and it is axiomatic that a litigant in this Court is not estopped from advancing "a new argument to support what has been his consistent claim." *Lebron* v. *Nat. R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Respondents' absence of substantive argument fairly indicates the materiality of the Ninth Circuit's break from this Court's decisions.

3. Respondents do not dispute that the First Circuit and the Ninth Circuit examined the same statutory language in Section 9607(a)(3)—"by any other party or entity"—and reached diametrically opposed interpretations. In *American Cyanamid Company* v. *Capuano*, 381 F.3d 6 (1st Cir. 2004), the First Circuit interpreted "by any other party or entity" as modifying the phrase "disposal or treatment," rather than "owned or possessed," *id.* at 24, while the decision below rejected that construction and inserted an "or" into the statutory text so that "by any other party or entity" might modify "owned or possessed" instead of "disposal or treatment." Pet. App. 24a. As a result of those binding and conflicting interpretations, in the First Circuit, a responsible "arranger" must *both* "own[ ] or possess[ ]" the waste *and* arrange with some "other party or entity," *see Am. Cyanamid*, 381 F.3d at 24, while in the Ninth Circuit, one may be held liable as an arranger *whether or not* he "owned or possessed" the waste

and *whether or not* he arranged with any "other party or entity." Pet. App. 28a.

Respondents nevertheless contend that there is no circuit split as to the meaning of "by any other party or entity" for this Court to address. Respondents suggest that *American Cyanamid* was concerned only with whether the defendant "owned or possessed" the waste, and that its statement that, "for arranger liability to attach, the disposal or treatment must be performed *by another party or entity*" is dictum. 381 F.3d at 24 (emphasis added). *See* Br. in Opp. of Pakootas 26-27; Br. in Opp. of Washington 12. But as the First Circuit recognized, under CERCLA's arranger provision, the questions whether an "arranger" must arrange with another party or entity, and whether an arranger must own or possess the waste, are two sides of the same coin. The two questions together turn on the construction of the phrase "by any other party or entity."

If, as the First Circuit *held*, the phrase modifies "disposal or treatment," it follows *both* that an arranger must arrange with a third party *and* that an arranger must own or possess the waste. Contrariwise, if, as the decision below holds, "by any other party or entity" expands disjunctively the preceding clause (the statute's omission of the critical "or" notwithstanding) it follows both that an "arranger" may arrange only with itself and that an arranger need not ever own or possess the waste. That, in both cases, only one result of the statutory construction was outcome-determinative does not transform the other result into an insignificant dictum. The twin results are inextricably linked to the single statutory construction giving rise to each. Accordingly, the Ninth Circuit's construction of "by any other party or entity" and its conclusion that arrangers need not arrange with "any other party or entity" conflict intractably with the First Circuit's opposing construction of the same phrase and the conclusion that follows ineluctably from that construction that the disposal

"must be performed by another party or entity." *Am. Cyanamid*, 381 F.3d at 24.

The result of the diametrically opposed interpretations of CERCLA Section 9607(a)(3) is to subject entities in the First Circuit to a different liability scheme than entities located (or sued) in the Ninth Circuit. "[T]he conflict created by the decision below will directly affect companies and industries that operate in multiple states [and] . . . who now face varying rules and potentially different outcomes with respect to a crucial liability determination." Br. for *Amici Curiae* Nat'l Mining Ass'n *et al.* 20. Restoring uniformity as to this important provision of federal law is a paradigmatic ground for the exercise of certiorari jurisdiction. *See Braxton* v. *United States*, 500 U.S. 344, 347-48 (1991).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 15, 2007

No. 06-1188

In the Supreme Court of the United States

TECK COMINCO METALS, LIMITED, PETITIONER

v.

JOSEPH A. PAKOOTAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Petitioner is a Canadian company that owns and operates a smelter approximately ten miles north of the United States border. The smelter discharged slag containing hazardous substances into the Columbia River, which carried the slag into the United States. Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, the Environmental Protection Agency (EPA) issued a unilateral administrative order requiring petitioner to conduct a remedial investigation/feasibility study at an affected site in the United States. After respondents filed this citizen suit to enforce that order, EPA withdrew the order pursuant to a settlement agreement with petitioner. The questions presented are:

1. Whether respondents' citizen suit is moot now that EPA has withdrawn the order that respondents seek to enforce.

2. Whether a foreign person who discharged hazardous substances in a foreign country in a manner that directly and foreseeably caused those substances to become deposited in the United States may be held liable under CERCLA for the cleanup of affected sites in the United States.

3. Whether a person may be held liable under CERCLA as having "arranged" for disposal of hazardous substances within the meaning of 42 U.S.C. 9607(a)(3) if that person disposed of hazardous substances itself, without the involvement of another party.

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In the Supreme Court of the United States

No. 06-1188

TECK COMINCO METALS, LIMITED, PETITIONER

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JOSEPH A. PAKOOTAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, in response to the serious environmental and health dangers posed by sites contaminated by hazardous substances. *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA provides the President, who has delegated the relevant authority to the Environmental Protection Agency (EPA) (Exec. Order No. 12,580, 3 C.F.R. 193 (1987)), with multiple options for cleaning up contaminated sites. For example, EPA may undertake a response action

(including cleanup), 42 U.S.C. 9604 (2000 & Supp. IV 2004), or may compel, by means of an administrative order or a request for judicial relief, a party to undertake a response action. 42 U.S.C. 9606. A party is generally liable under CERCLA if there was a release or threatened release of a hazardous substance from a facility and the defendant falls within the definition of an owner or operator, past owner or operator, arranger, or transporter. 42 U.S.C. 9607(a).

2. Petitioner is a Canadian corporation that operates the world's largest zinc and lead smelter in Trail, British Columbia, approximately ten miles north of the United States border. For 90 years, from 1906 until 1995, petitioner's smelter discharged up to 145,000 tons of slag annually (13 million tons total) into the Columbia River. That river flows directly into the United States. Pet. App. 4a-5a, 72a.

In August 1999, the Confederated Tribes of the Colville Indian Reservation petitioned EPA, pursuant to 42 U.S.C. 9605, to conduct an assessment of hazardous substance contamination along the Columbia River. EPA investigated the Upper Columbia River Site Assessment Area, which extends downstream from the border for approximately 70 miles. In the river and on adjacent beaches, EPA found contaminants associated with petitioner's slag, including arsenic, cadmium, copper, lead, mercury, and zinc, all of which are harmful to human and aquatic life. Pet. App. 70a-72a.

EPA spent more than a year attempting to negotiate a settlement with petitioner and its American affiliate, Teck Cominco American Inc. (TCAI), without success. In October 2003, EPA sent TCAI a draft administrative order on consent, requesting that it voluntarily undertake a remedial investigation/feasibility study (RI/FS)

under CERCLA. TCAI responded with a proposal that, EPA concluded, would not have provided the information necessary for EPA to select an appropriate remedy. Pet. App. 73a-75a.

On December 11, 2003, EPA issued a unilateral administrative order directing petitioner to conduct an RI/FS of the Upper Columbia River Site. Pet. App. 68a-99a. Petitioner responded that it did not consider itself subject to that order. *Id.* at 102a-104a.

3. In July 2004, respondents Joseph A. Pakootas and Donald R. Michel filed a complaint pursuant to CERCLA's citizen-suit provision, 42 U.S.C. 9659(a)(1), which authorizes a citizen to bring suit against "any person * * * who is alleged to be in violation of any * * * order which has become effective pursuant to [CERCLA]." See Pet. App. 105a-112a. The complaint sought a declaration that petitioner was violating EPA's order, an injunction enforcing that order, civil penalties, and attorney's fees. *Id.* at 111a. The State of Washington intervened as a plaintiff and filed a substantially similar complaint. *Id.* at 113a-119a.

The district court denied petitioner's motion to dismiss. Pet. App. 29a-59a. The court found that it had personal jurisdiction over petitioner because, under the facts alleged in respondents' complaints, petitioner's "dispos[al] of hazardous substances into the Columbia River is an intentional act expressly aimed at the State [of] Washington" that "causes harm which [petitioner] knows is likely to be suffered downstream by" respondents. *Id.* at 34a-35a.

The district court next "assume[d] this case involves an extraterritorial application of CERCLA to conduct occurring outside U.S. borders." Pet. App. 38a. The court held, however, that the presumption against extra-

territorial application of United States laws is inapplicable here because it "generally does not apply where conduct in a foreign country produces adverse effects within the United States," and "CERCLA affirmatively expresses a clear intent by Congress to remedy 'domestic conditions' within the territorial jurisdiction of the U.S." *Id.* at 44a, 57a. The court then stated that, while petitioner did not "appear" to be liable as an owner or operator of the Upper Columbia River Site, or as a transporter of hazardous substances, *id.* at 46a, "'arranger' liability under CERCLA cannot be ruled out," *id.* at 49a. Accordingly, the court denied the motion to dismiss, but certified its order for immediate appeal under 28 U.S.C. 1292(b). Pet. App. 59a.

4. After the court of appeals granted petitioner's request for interlocutory appeal, EPA, petitioner, and TCAI entered into a settlement agreement. See Pet. App. 9a n.10. TCAI agreed to undertake an RI/FS in accordance with standards promulgated under CERCLA, and EPA agreed to withdraw the unilateral administrative order and not to seek civil penalties or injunctive relief for petitioner's prior non-compliance with the order. Pet. C.A. Request for Judicial Notice, Exh. 2, at 1-2, 22, 25 (June 2, 2006) (Settlement Agreement) <http://www.law.washington.edu/Directory/docs/Robinson-Dorn/TrailSmelter>.[1]

5. The court of appeals affirmed the district court's order. Pet. App. 1a-28a. The court took judicial notice of the settlement agreement and EPA's withdrawal of

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[1] In November 2005, while the interlocutory appeal was pending, respondents amended their complaints in the district court to add claims seeking recovery of response costs and natural resource damages, pursuant to 42 U.S.C. 9607(a)(4). See Am. Compl. 7-8; First Am. Compl. in Intervention 7-8.

its order. *Id.* at 9a n.10. After explaining that "[t]he parties are agreed that the settlement * * * does not render this action moot," the court stated that "it is sufficient for us to note that [respondents'] claims for civil penalties and for attorneys' fees are not moot." *Ibid.* The court of appeals "le[ft] for the district court to decide in the first instance whether the claims for injunctive and declaratory relief are moot." *Ibid.*

The court of appeals next determined that the presumption against extraterritoriality is inapplicable because this case involves a domestic application of CERCLA. Pet. App. 12a-23a. The court reasoned that CERCLA liability turns on the release of hazardous substances from a "facility," and here, the facility (the Upper Columbia River Site) is located within the United States, and the relevant release—the leaching of hazardous substances from slag that had settled at the site—also occurred within the United States. *Id.* at 13a-15a.

Finally, the court of appeals rejected petitioner's argument that it was not liable as an arranger because it had "disposed of the slag itself," without the involvement of a third party. Pet. App. 23a. CERCLA's arranger-liability provision refers to:

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility.

42 U.S.C. 9607(a)(3). The court interpreted the phrase "by any other party or entity" to mean that an arranger could be liable for disposal of hazardous substances that were owned or possessed "by such person" or "by any other party or entity." Pet. App. 24a. Thus, the court

rejected petitioner's argument that a person can be liable as an arranger only if one person disposed of another person's waste. See *id.* at 25a-26a. In so holding, the court emphasized that neither respondents' complaints nor EPA's order "specifically allege[d] that [petitioner] is an arranger," and the court "express[ed] no opinion" on whether petitioner is also liable as an owner, operator, or transporter. *Id.* at 23a & n.19.

DISCUSSION

Respondents brought this action under CERCLA's citizen-suit provision to enforce EPA's unilateral administrative order. Now that EPA has withdrawn that order, respondents' citizen-suit claims—the only claims considered by the lower courts—are moot. While respondents amended their complaints in the district court during the pendency of the interlocutory appeal to add additional claims that do not depend on the continued existence of EPA's order, those claims have not been considered by the courts below, and petitioner may have additional defenses to the new claims. Further proceedings on remand may thus shed significant light on the validity of respondents' remaining claims. The current posture of this case therefore counsels strongly against this Court's review.

In any event, the questions presented do not merit review at this time. There is no division among the circuits on those questions. Instead, the decision below turns on an issue of first impression—whether, or under what circumstances, CERCLA applies when a foreign company discharges hazardous substances abroad in such a manner as to produce a subsequent release at a facility in the United States. While international pollution can be diplomatically sensitive, the comity concerns

invoked by petitioner are unusually weak here, because petitioner dumped millions of tons of slag into a river just upstream of the border. Accordingly, there is no need for immediate review, and this case would provide a particularly poor vehicle for considering the comity issue in any event.

A. Respondents' Challenge To Petitioner's Failure To Comply With EPA's Now-Withdrawn Order Is Moot

Respondents brought this action under CERCLA's citizen-suit provision, which authorizes suit "against any person * * * who is alleged to be in violation of a[n] * * * order which has become effective" pursuant to the statute. 42 U.S.C. 9659(a)(1). As the original complaints make clear, respondents seek "to enforce the [order] issued to [petitioner]." Pet. App. 105a-106a; accord *id.* at 106a, 114a, 115a. Indeed, all of the claims in the original complaints—the only complaints that were before the courts below—are expressly premised on petitioner's failure to comply with EPA's unilateral administrative order. *Id.* at 110a-111a, 118a. Following EPA's withdrawal of that order, there is no longer an "order" for respondents to enforce through this citizen suit under Section 9659(a)(1).

Without analysis, the court of appeals "note[d]" in a footnote that respondents' requests for civil penalties and attorney's fees are not moot, and "le[ft] for the district court to decide in the first instance whether the claims for injunctive and declaratory relief are moot." Pet. App. 9a n.10. The court of appeals may have relied in large part on petitioner's concession that respondents' requests for civil penalties and attorney's fees were not moot. See Pet. C.A. Request for Judicial Notice 5. But this Court must assure itself of its jurisdiction, *Steel Co.*

v. *Citizens for a Better Env't*, 523 U.S. 83, 93 (1998), and petitioner is mistaken in conceding that the case is not moot.

1. In construing analogous citizen-suit provisions in other environmental statutes, this Court has emphasized that "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 187-188 (2000) (quoting *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987)); see *Steel Co.*, 523 U.S. at 105-108. A citizen suit must be brought against a person "who is alleged to be in violation of" law. 42 U.S.C. 9659(a)(1). As this Court explained in construing the Clean Water Act's similar citizen-suit provision, "[t]he most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation," as opposed to a past violation. *Gwaltney*, 484 U.S. at 57. Moreover, before a plaintiff may file a citizen suit under CERCLA, it must provide the potential defendant and the United States with 60 days' advance notice. 42 U.S.C. 9659(d)(1). Like the Clean Water Act's analogous notice requirement, that provision would be "incomprehensible" if citizens could sue based on past violations, because "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." *Gwaltney*, 484 U.S. at 59-60.

In light of those authorities, respondents' citizen suit is moot. The complaints gave rise to a live case or controversy at the time they were filed, because petitioner was not complying with EPA's order. But EPA's withdrawal of that order means that petitioner is no longer

violating it. Thus, there is no longer any basis for this citizen suit seeking to enforce a now non-existent order.

Contrary to the court of appeals' assumption, respondents' request for civil penalties does not change that conclusion. Civil penalties are paid to the United States, *not* to citizen-plaintiffs. 26 U.S.C. 9507(b)(4); see *Steel Co.*, 523 U.S. at 106. And because citizen suits must be based on ongoing violations, this Court has held that "citizens, unlike the Administrator, may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation." *Gwaltney*, 484 U.S. at 59; see *Laidlaw*, 528 U.S. at 188 ("[P]rivate plaintiffs, unlike the Federal Government, may not sue to assess penalties for wholly past violations."); *Steel Co.*, 523 U.S. at 106. Of particular relevance here, plaintiffs may not seek such penalties when it is "merely speculative" whether the "deterrent effect" of their imposition would cause the defendant to alter its behavior in such a way as to redress the plaintiffs' injuries. *Laidlaw*, 528 U.S. at 186-187; see *Steel Co.*, 523 U.S. at 106-107. Now that EPA has withdrawn the order, civil penalties would not (and could not) encourage compliance with that non-existent order, but instead would be strictly backward-looking. Petitioners' requests for the imposition of civil penalties are therefore moot.

Nor can respondents' requests for attorney's fees keep their citizen-suit claims alive. A party's "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim," including where, as here, the claim became moot during the litigation. *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 480 (1990); see *Laidlaw*, 528 U.S. at 192 n.5 (instructing the lower courts to "use caution to avoid carrying forward a

moot case solely to vindicate a plaintiff's interest in recovering attorney's fees"); *Steel Co.*, 523 U.S. at 107 (holding that plaintiff lacked standing because "[t]he litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself").

2. Respondents may contend that their claims are not moot because petitioner might not comply with the settlement agreement, and EPA might therefore issue another order against petitioner. This Court's decisions in *Gwaltney*, *Laidlaw*, and *Steel Co.* primarily considered plaintiffs' standing to sue at the outset of those cases. Mootness differs from standing in that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 190. Here, however, the mooting event is *EPA's* withdrawal of the order, not *petitioner's* voluntary compliance with it. In fact, petitioner never complied with the order, voluntarily or otherwise. Instead, it entered into a separate agreement with EPA. Thus, the voluntary-cessation exception does not apply here.

Even if petitioner failed to comply with the settlement agreement, EPA would not necessarily issue another administrative order. The agreement specifies dispute-resolution procedures, as well as significant penalties (other than issuance of a new order) for non-compliance. Settlement Agreement 14-16, 23-25. EPA could take aim at petitioner's violation of the agreement, rather than initiate another order targeted at petitioner's underlying primary conduct. And even if another order were issued, it could differ significantly from the withdrawn one, based on intervening developments.

The conclusion that respondents' claims are now moot is buttressed by the United States' agreement, as part of the settlement, "not to sue or take administrative action" for "civil penalties or injunctive relief for non-compliance with the" order, unless petitioner fails to perform its obligations under the agreement. Settlement Agreement 22. It would make little sense to permit respondents to sue for civil penalties payable to the United States when the United States has not only withdrawn the order underlying respondents' claims, but has also waived, as part of a settlement, the right to seek penalties unless petitioner fails to comply with the agreement. As this Court explained in *Gwaltney*, permitting citizens to sue for civil penalties after EPA agreed not to do so as part of a settlement would "curtail[] considerably" EPA's "discretion to enforce the Act in the public interest." 484 U.S. at 61.

Principles of *res judicata* also bar respondents' citizen-suit claims. The settlement agreement resolved the government's claims for civil penalties or injunctive relief for petitioner's non-compliance with EPA's now-withdrawn order. Settlement Agreement 22. As *parens patraie*, the United States acts on behalf of its citizens in litigating or resolving environmental enforcement actions. Where, as here, the government has already resolved its claims for the same relief sought in the citizen suit, preclusion principles bar a citizen-plaintiff's attempt to obtain such relief. See, *e.g.*, *Ellis* v. *Gallatin Steel Co.*, 390 F.3d 461, 476 (6th Cir. 2006); *United States EPA* v. *City of Green Forest*, 921 F.2d 1394, 1403-1404 (8th Cir. 1990), cert. denied, 502 U.S. 956 (1991).

3. The mootness of respondents' citizen-suit claims does not necessarily require vacatur of the court of appeals' judgment. If a case "has become moot" through

"happenstance" while "on its way here or pending [this Court's] decision on the merits," vacatur of the court of appeals' judgment may be appropriate. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 & n.3 (1994). Here, however, respondents' claims became moot *before* the court of appeals entered judgment, the court of appeals expressly addressed mootness (albeit erroneously), and neither party sought review of the court of appeals' mootness determination. Moreover, as explained below, the petition would not warrant this Court's review even if respondents' citizen-suit claims remained live, which further counsels against vacatur when the mooting event predated the court of appeals' decision and was not raised by either party. In any event, the mootness of respondents' citizen-suit claims poses a formidable barrier to this Court's review of any issue on the merits.

B. The Interlocutory Posture Of This Case Counsels Against This Court's Review

1. After petitioner filed its interlocutory appeal to the Ninth Circuit, respondents amended their complaints in the district court to add claims seeking recovery of response costs and natural resource damages, pursuant to 42 U.S.C. 9607(a)(4). See Am. Compl. 7-8; First Am. Compl. in Intervention 7-8. Those claims seek relief for injuries allegedly incurred by respondents, *ibid.*, and they are not subject to the limitations on citizen suits discussed above.

Nonetheless, because respondents first asserted their new, live claims after petitioner filed its interlocutory appeal, those claims were not considered or resolved by the courts below, and thus they are not prop-

erly before this Court. "[T]his is a court of final review and not first view." *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (citation omitted). Moreover, respondents' new claims do not and could not fall within the scope of the district court's order certifying an interlocutory appeal under Section 1292(b), because respondents had not yet asserted those claims at the time of the district court's order.

It is also unclear whether the questions presented here will be dispositive of respondents' new claims. For example, the court of appeals correctly observed that, "[i]n private cost recovery actions under § 9607(a), the claimant must incur response costs that are both 'necessary' and 'consistent with the national contingency plan.'" Pet. App. 13a n.13 (quoting 42 U.S.C. 9607(a)(4)(B)). The court did not consider whether those requirements are met here, however, because they do not apply to respondents' citizen-suit claims, which were the only claims before the court of appeals. Thus, the appropriate course is for the district court to adjudicate, in the first instance, respondents' new cost-recovery and natural-resources-damages claims.

2. Even in cases where the claims considered by the lower courts have not become moot, this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of the petition for a writ of certiorari). The lack of finality "alone [is] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916).

That principle, while far from absolute, has particular force here, not only for the reasons discussed above, but also because further factual development could shed

light on the questions presented. For example, petitioner argues (Pet. 25-29) that it is not liable as an arranger because no third party was involved in the relevant discharges. Even if petitioner's legal argument is correct, however, it is at least possible that discovery will reveal that petitioner hired an independent contractor to assist in the discharges. Alternatively, respondents might argue on remand that, regardless of any liability as an arranger, petitioner is liable as an operator or transporter. The court of appeals correctly observed that EPA's (now-withdrawn) order is not explicitly predicated on an arranger theory of liability, and that court left open the question whether petitioner could be held liable as an operator or transporter. Pet. App. 23a & n.19. Nor has the district court squarely foreclosed that possibility. See *id.* at 46a (noting only that petitioner did not "appear" to be liable as an owner or operator). This Court and the courts of appeals have construed CERCLA's operator and transporter provisions broadly. See, *e.g.*, *United States* v. *Bestfoods*, 524 U.S. 51, 65 (1998) (noting that operator liability could encompass "even a saboteur who sneaks into [a] facility at night to discharge its poisons"); *Kaiser Aluminum & Chem. Corp.* v. *Catellus Dev. Corp.*, 976 F.2d 1338, 1343 (9th Cir. 1992) (holding that company that excavated and graded contaminated soil within a facility may be liable as an operator and transporter).

C. The Court of Appeals' Decision Does Not Conflict With Decisions Of Other Appellate Courts And Lacks Sufficient Importance To Warrant This Court's Review At This Time

Even setting aside the procedural impediments to this Court's review, the petition presents a question of first impression that should be permitted to percolate in

the lower courts and that lacks sufficient importance to warrant this Court's review at this time.

1. Petitioner does not assert a conflict among the circuits on the first question presented (involving international comity), and indeed does not identify any other decisions addressing that question. The fact that the comity question in this case is apparently arising now for the first time, notwithstanding the decades-old potential for disputes concerning cross-border pollution, strongly suggests that it lacks the recurring importance that petitioner attributes to it.

As a practical matter, the United States has dealt with international pollution issues in a variety of ways. First, as it did here, the United States often attempts to achieve diplomatic solutions to transborder pollution issues.[2] Second, in disputes with Canada, the United States has discretion to seek advice or dispute resolution under the Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, Arts. IX, X, 36 Stat. 2448, 2452, 2453, and has sought such advice jointly with Canada in the past, though the treaty does not require the United States to do so. See *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 507 (1971) (Douglas, J., dissenting). Third, there has been some litigation of transborder pollution disputes in the United States courts. See, *e.g.*, *Her Majesty the Queen in Right of Ont.* v.

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[2] EPA attempted to negotiate with Canada regarding a study of cross-border pollution on the Columbia River, but negotiations broke down. The United States also involved Canada in developing the settlement agreement with petitioner, and agreed to give Canada an enhanced consultative role in the remedial investigation process. A representative of the Canadian government has been actively participating in technical discussions related to that process.

United States EPA, 912 F.2d 1525 (D.C. Cir. 1990); *Michie* v. *Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213 (6th Cir.), cert. denied, 419 U.S. 997 (1974).

In practice, therefore, issues have been resolved satisfactorily in various ways, without the need for a definitive resolution of the comity question. The order issued to petitioner represents the only time in the 27 years since CERCLA's enactment that EPA has sought to compel a foreign party to take a response action with respect to domestic pollution resulting from actions in a foreign country, and EPA has now withdrawn that order. The United States is aware of only one other effort (by private parties) to apply CERCLA in an international setting, and the Ninth Circuit correctly rejected that effort because the facility was outside of the United States. See *ARC Ecology* v. *United States Dep't of the Air Force*, 411 F.3d 1092 (2005).

2. The court of appeals' decision does not (Pet. 9) "threaten[] to disrupt our ties with Canada." Because this case involves a direct and compelling United States interest, an assertion of jurisdiction to prescribe law would be consistent with considerations of international comity. Indeed, the Province of British Columbia recognizes that, "to the extent [petitioner] is responsible for polluting the Columbia River, it may be required to contribute to the cleanup costs." B.C. Amicus Br. 12 n.6; see *id.* at 15 n.8. While Canada and British Columbia would prefer to resolve this dispute through diplomatic channels and negotiation rather than litigation in United States courts—a preference the United States strongly shares—Canada correctly "recognizes the possibility that some cases involving transboundary pollution may appropriately be resolved in the domestic courts of Canada or the United States." Can. Amicus Br. 6.

Canada argues that the court of appeals erred by "not even acknowledg[ing], let alone analyz[ing], the relevant factors for determining whether a state may reasonably prescribe laws with respect 'to a person or activity having connections with another state.'" Can. Amicus Br. 13 (quoting Restatement (Third) of Foreign Relations Law of the United States § 403(1), at 244 (1987) (Restatement)). Assuming *arguendo* that the Restatement analysis is relevant, however, it only confirms that comity concerns would not preclude an assertion of jurisdiction to prescribe in the circumstances of this case. According to the Restatement, "a state has jurisdiction to prescribe law with respect to * * * conduct outside its territory that has or is intended to have substantial effect within its territory." *Id.* § 402(1)(c) at 227-228. The Restatement provides, however, that a state may not exercise such jurisdiction in situations where it would be "unreasonable" to do so. *Id.* § 403(1), at 244. The Restatement illustrates its approach by explaining that assertion of jurisdiction based on domestic effects is "not controversial with respect to acts such as shooting * * * across a boundary." *Id.* § 402 cmt. d at 239. Indeed, "[t]he traditional example" is that "when a malefactor in State *A* shoots a victim across the border in State *B*, State *B* can proscribe the harmful conduct." *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C. Cir. 1984).

Here, petitioner's deliberate, 90-year discharge of millions of tons of hazardous substances into a river just upstream from the United States directly and foreseeably caused harmful effects in the United States. Petitioner's conduct could arguably be analogized in some respects to firing a gun across the border, because it was inevitable that the river would carry the pollution di-

rectly into the United States. Moreover, the slag at the bottom and on the beaches of the Columbia River is clearly identifiable and directly attributable to petitioner's actions. Pet. App. 5a.[3]

Petitioner contends (Pet. 9, 23) that the court of appeals' decision paves the way for suits over trans-oceanic pollution such as acid rain or mercury from Asia. Distant sources that contribute to widespread and diffuse air pollution, however, present a much different case from this one, and are in no way analogous to the "traditional example" (*Laker Airways*, 731 F.2d at 922) of a gun being fired across a border. Thus, it would not necessarily follow from the assertion of jurisdiction in this case that the courts of the United States would exercise jurisdiction in the cases posited by petitioner. Moreover, this Nation's courts might lack personal jurisdiction in those cases. Cf. Pet. App. 34a-35a (basing personal jurisdiction in this case on respondents' allegation that petitioner intentionally aimed its slag at the United States and caused harm that petitioner knew was likely to be suffered downstream).

3. The arranger-liability question does not independently warrant this Court's review. CERCLA's arranger-liability provision refers to:

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment,

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[3] The position of the United States is that the reasonableness test set forth in the Restatement does not restrict the United States' jurisdiction to prescribe. Nonetheless, that test, which Canada invoked, confirms that considerations of comity would not preclude an assertion of jurisdiction to prescribe in the circumstances of this case.

> of hazardous substances owned or possessed by such person, by any other party or entity, at any facility.

42 U.S.C. 9607(a)(3). Petitioner argues (Pet. 25-29) that it is not liable as an arranger because it disposed of the slag itself, without involving a third party.

There is no conflict among the circuits on that question. In *American Cyanamid Co.* v. *Capuano*, 381 F.3d 6 (1st Cir. 2004), on which petitioner relies (Pet. 25-26), the owner of hazardous substances arranged with a broker to dispose of them. 381 F.3d at 25. Thus, that case did not present the question whether a person who disposes of hazardous substances *without* the involvement of a third party can be liable as an arranger; instead, the question was whether "arranger liability can only be imposed on a party that owned or possessed hazardous materials, not on a party that brokered the disposal of hazardous material." *Id.* at 23. After determining that arranger liability is not limited to owners of hazardous substances, the court upheld the imposition of arranger liability in that case. *Id.* at 25. The First Circuit's imposition of arranger liability in *American Cyanamid* in no way conflicts with the court of appeals' determination that, if the allegations of respondents' complaints are true, petitioner is also liable as an arranger under the far different circumstances of this case.

To be sure, in reaching its conclusion, the First Circuit construed the statutory phrase "by any other party or entity" to modify "disposal or treatment," rather than "owned or possessed by such person." *American Cyanamid*, 381 F.3d at 23-24. And the court said in passing that a consequence of its reading is that, "for arranger liability to attach, the disposal or treatment must be performed by another party or entity, as was the case here." *Id.* at 24. But that passing observation was *dic-*

tum because, as the court observed, a third party was involved there. See *ibid.*

In any event, the arranger-liability question presented here seldom has practical significance because, if a party is liable as an arranger on the theory adopted by the court of appeals, it ordinarily will also be liable as an owner, operator, or transporter. When all of the relevant conduct occurs domestically, the relevant "facility" normally includes the entire affected area, in which case it is generally clear that an owner or operator released hazardous substances within the facility. Alternatively, operator or transporter liability can attach to surreptitious dumping or other activity on another person's land. See, *e.g.*, *Bestfoods*, 524 U.S. at 65; *Kaiser Aluminum*, 976 F.2d at 1343.

Thus, petitioner cites *no* case in which the arranger-liability question at issue here was outcome-determinative. In *American Cyanamid* itself, the court of appeals' imposition of arranger liability was an alternative holding, because the court held that the arranger was also liable as an operator. 381 F.3d at 22-25. As discussed, it is not even clear that the arranger-liability question presented here will ultimately be dispositive in this case. See pp. 13-14, *supra*. Thus, that question does not independently warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

TECK COMINCO METALS LTD.,

Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, and the STATE OF WASHINGTON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE CANADIAN CHAMBER OF COMMERCE AND THE MINING ASSOCIATION OF CANADA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*

The Canadian Chamber of Commerce ("CCC") and the Mining Association of Canada ("MAC") submit this joint *amici curiae* brief in support of the Petition for Writ of Certiorari filed by Petitioner Teck Cominco Metals, Ltd. ("Teck Cominco").[1]

Since 1925, the CCC has been Canada's largest business association, with approximately 170,000 members doing business in all parts of Canada. The CCC closely follows U.S.-Canada relations and all transborder issues, because of the integrated nature of the North American economy, and because many of its members have operations in both countries, and own or operate facilities located near the U.S.-Canada border.

The MAC represents Canadian mining companies engaged in mineral exploration, mining, smelting, refining, and semi-fabrication. As with the CCC, many of the MAC's members own or operate facilities located near the U.S.-Canada border, or adjacent to cross-boundary bodies of water.

Trans-border environmental matters, like the one here, raise serious concerns. However, the issue is not *whether* such questions need to be dealt with (they do), but *how* to do so. *Amici* submit there is a long history of the U.S. and Canada and the U.S. and Mexico dealing with such situations by inter-governmental agreements and not

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[1] Letters reflecting the written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

Counsel for the other parties did not author this brief in whole or in part. No person or entity, other than the CCC and the MAC, made a monetary contribution to the preparation and submission of this brief.

by private litigation like this case. Absent any indication of Congressional intent to sweep aside this century-old way of dealing with trans-border environmental concerns (and there is none), the Ninth Circuit erred in doing so.

The CCC and MAC support Teck Cominco's Petition because the Ninth Circuit's extraordinary opinion reaches a troubling result affecting any U.S. or Canadian business operating in the U.S.-Canada border region. Under its logic, Canadian businesses will be vulnerable to suit by private litigants under the U.S. Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") – *even if those Canadian businesses operate entirely in Canada, and in full compliance with Canadian environmental and regulatory legal requirements.* This is truly unprecedented, because it is the "first case ever" to reach such a result. Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 367 (2005) (citing *Washington State Tribe Sues Canada Smelter Over Pollution*, Dow Jones Int'l News, Jul. 22, 2004)).

The Government of Canada has protested the enforcement of U.S. environmental laws on Canadian businesses operating lawfully and solely in Canada, because such enforcement violates Canadian sovereignty. *See* Government of Canada's *Amicus Curiae* Brief in Support of Appellant and for Reversal of the Order of the District Court. As stated in its Ninth Circuit *amicus* brief, "[t]he Government of Canada has a strong interest in preserving from interference, by private litigation in United States courts, its sovereign right to regulate Canadian persons and companies operating in Canada." *Id.* at 3-4. It has also warned that allowing this litigation to proceed would

likely result in retaliatory litigation against U.S. businesses operating in the United States for violations of *Canadian* environmental laws. ER at 72. These prospects cause grave concern to all Canadian and U.S. businesses operating on either side of the U.S.-Canada border, including *amici*'s members.

However, the Ninth Circuit's broad ruling does not apply only to Canadian businesses. Its logic applies just as easily to businesses located in Mexico – such as the thousands of companies operating near the U.S. border under the Mexican government's "Maquiladora" program – or even to businesses operating *outside* North America, if their facilities cause any effects in the United States, such as through global air pollution flows. *See, e.g.*, Randolph E. Schmid, *Asian Air Pollution Generates Stronger Storms Over Pacific*, USA Today, Mar. 6, 2007 (reporting on National Academy of Sciences study, finding that air pollution in Asia generates "climactically significant" storms in the North Pacific). Indeed, it is difficult to see how the Ninth Circuit's decision could be limited. Using the Ninth Circuit's approach, any business lawfully operating anywhere in the world could theoretically come within CERCLA's reach, if pollution emitted from that business had environmental effects in the United States.

Subjecting economic activity occurring wholly in other countries to the vagaries of U.S. court litigation without any showing that Congress intended this – and there is no evidence of such intent here – could significantly impact the conduct of business. It would insert legal unpredictability into normal business arrangements, undermine business and regulatory certainty, and force companies operating solely and lawfully in their home countries also

to consider whether they might be ensnared in U.S. litigation under U.S. law.

Such a rule would also interfere with the ability of countries such as the United States, Canada, and Mexico to structure their foreign and economic policies through government-to-government agreements. These three countries – all parties to the North American Free Trade Agreement ("NAFTA") – have, for a century, relied on mechanisms for airing, managing or resolving trans-border environmental issues on a government-to-government basis, *e.g.*, the Boundary Waters Treaty of 1909 and the International Joint Commission, or the NAFTA Commission on Environmental Cooperation. These mechanisms have been repeatedly and successfully used by these governments to deal with trans-border environmental disputes and issues, rather than relying on lawsuits by private litigants that serve the litigants' private interests. These agreements and approaches have provided certainty to the business community in each country.

Nevertheless, the Ninth Circuit brushed this history of North American inter-governmental cooperation aside – indeed, essentially ignored it – and has created an alarming scenario where private litigation will become the primary means of resolving trans-border environmental disputes. This is the wrong result – especially when Congress has never indicated it wants this outcome. Given the vital importance of this issue and the unprecedented nature of the Ninth Circuit's opinion, *amici* support Teck Cominco's Petition for a Writ of Certiorari, and urge the Court to grant it.

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REASONS WHY THE PETITION SHOULD BE GRANTED

"North America constitutes a vast and interconnected system – physically, ecologically, and economically." Jameson Tweedie, *Transboundary Environmental Impact Assessment Under the North American Free Trade Agreement*, 63 WASH. & LEE L. REV. 849, 857 (2006). Indeed, almost 90% of Canada's population lives within 100 miles of the U.S. border. Parrish, *supra*, at 385 (citing Rebecca Jannol et al., *Migration Policy Institute, U.S.-Canada-Mexico Fact Sheet on Trade and Migration* 1, 1 (2003)). Thus, most Canadian economic activity takes place within that 100 mile border region.

An enormous amount of economic activity is similarly concentrated in the U.S.-Mexico border region, which began developing in 1965 with the institution by the Mexican government of the "Maquiladora" program – part of the Mexican government's larger "Border Industrialization Program" ("BIP"). U.S. General Accounting Office, *Mexico's Maquiladora Decline Affects U.S.-Mexico Border Communities and Trade; Recovery Depends in Part on Mexico's Actions*, July 2003, at 5. The enactment of NAFTA in 1994 has only increased the economic integration of the U.S.-Mexico border communities, and the two countries' economies.

As a result of economic activities near and across their respective borders, the United States, Canada, and Mexico "'have a lot of trans-boundary environmental problems.'" Tweedie, *supra*, at 857 (quoting John Knox, *Federal, State and Provincial Interplay Regarding Cross-Border Environmental Pollution*, 27 CAN.-U.S. L.J. 199, 199 (2001)). The United States and Canada alone "'share an extensive border

that includes some 150 rivers and lakes – a situation that has "provided ample opportunity for the generation of international environmental disputes."'" Parrish, *supra*, at 383-84 (quoting Joel A. Gallob, *Birth of the North American Transboundary Environmental Plaintiffs: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy*, 15 HARV. ENVTL. L. REV. 85, 132-33 (1991)). *See also generally* Randall S. Abate, *Dawn of a New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context*, 31 COLUM. J. ENVTL. L. 87, 131-32 (2006) (discussing a variety of currently brewing transboundary environmental disputes).

For more than a century, the North American countries have dealt comprehensively with trans-boundary environmental issues *solely* through diplomatic and intergovernmental means. On issue after issue – from acid rain, to solid waste, to sewage dumping, to pollution emanating *from the very smelter at issue in this case* (the "Trail Smelter") – the governments of the United States, Canada, and Mexico have endeavored to solve disagreements and difficulties collaboratively and cooperatively, in the common interest of the North American countries. These diplomatic efforts have included such mechanisms as the International Boundary Commission (established in 1889) (U.S.-Mexico), the International Waterways Commission (established in 1905) (U.S.-Canada), the Boundary Waters Treaty of 1909 and its International Joint Commission (U.S.-Canada), the U.S.-Mexico Water Treaty of 1944, creating the International Boundary and Water Commission, the Great Lakes Water Quality Agreement of 1978 (U.S.-Canada), the La Paz Agreement of 1983 (U.S.-Mexico), the

Border 2012 effort (U.S.-Mexico), and the NAFTA "Side Agreement" on Environmental Cooperation (U.S.-Mexico-Canada), which included creation of the NAFTA Commission on Environmental Cooperation. In short, the fact of inter-governmental cooperation and joint management on environmental issues is well established and fully operational. This has produced far more progress, substantive results, and business stability than would have a situation where progress and resolution of issues could only be made through litigation.

These diplomatic and inter-governmental mechanisms for regulating, managing or solving trans-boundary environmental issues have served the North American countries well. Indeed, the International Joint Commission ("IJC") created by the U.S.-Canada Boundary Waters Treaty of 1909 was instrumental in resolving one of the most contentious trans-boundary environmental disputes of the 20th century – a dispute that arose from the very same smelter at issue in this case. The so-called "Trail Smelter" proceedings – a bi-national dispute adjudicated under the IJC – which resulted in the Canadian government agreeing to compensate U.S. farmers and others for damages caused by air pollution emanating from the smelter, and imposing sulfur dioxide fume controls on that smelter. Parrish, *supra*, at 420-21 (discussing the Trail Smelter Arbitration (U.S. v. Can.) 3 R.I.A.A. 1905 (1938) ("Trail Smelter I"), further proceedings 3 R.I.A.A. 1938 (1941) ("Trail Smelter II")).

The inter-governmental structure that resolved the Trail Smelter dispute is still in existence today, with its chief mandate being to resolve trans-boundary environmental issues and related disputes between the United States and Canada. L.H. Legault, *The Roles of Law and*

Diplomacy in Dispute Resolution: The IJC as a Possible Model, 26 CAN.-U.S. L.J. 47, 50 (2000) (one of the IJC commissioners (Legault) noting that "[t]he fundamental mandate of the Commission, as reflected in the preamble to the Boundary Waters Treaty, is to prevent and resolve disputes between Canada and the United States"); *see also id.* at 52-53 (noting the IJC "has developed a rich body of practice in addressing transboundary water and environmental issues assigned to it under the Boundary Waters Treaty, the Great Lakes Water Quality Agreement [of 1978], and other agreements"); Parrish, *supra*, at 419 ("Using the IJC as a method for dispute resolution has been successful").

Similarly, the United States and Mexico have established a structure for resolving their trans-border environmental disputes – culminating in the La Paz Agreement of 1983. Under the Agreement, the governments of Mexico and the United States agreed to "cooperate in the field of environmental protection in the border area on the basis of equality, reciprocity and mutual benefit." La Paz Agreement, art. 1, Aug. 14, 1983, 35 U.S.T. at 2918. Out of the La Paz structure have grown other mechanisms for U.S.-Mexico government efforts to address transboundary pollution, such as the U.S.-Mexico Integrated Border Environmental Plan, which is a "broad program of cooperation between the Mexican and U.S. environmental agencies." Peter M. Emerson, et al., *Managing Air Quality in the Paso Del Norte Region, in Environmental Management on North America's Borders*, 137 (Richard Kiy & John D. Wirth eds., 1998). Another has been the more recent effort under the rubric of the Border 2012: U.S.-Mexico Environmental Program, a further effort of the two countries' environmental agencies to

increase governmental and stakeholder cooperation in addressing transboundary environmental issues. *See Border 2012: U.S.-Mexico Environmental Program*, http://www.epa.gov/usmexicoborder.

Surprisingly, the Ninth Circuit's decision completely ignores these agreements and mechanisms to resolve cross-border environmental issues. Its decision does not even *mention* the Boundary Waters Treaty, the International Joint Commission, the Trail Smelter proceedings, or *any* of the mechanisms the United States and Canada have utilized over the last 100 years to resolve transboundary environmental disputes.

The Ninth Circuit's decision is fundamentally at odds with the principles that have guided Canada and the U.S. on environmental matters to date. The Ninth Circuit's decision does not even acknowledge the Canadian government's strong objections to the litigation, and the troubling concept that U.S. environmental laws could be applied to Canadian businesses operating *solely and lawfully in Canada*.[2] The Ninth Circuit decision inexplicably ignores

[2] Indeed, "Canada sets its own environmental agenda, sets its own environmental standards, has its own body of laws that applies to both the regulation of operators like [Teck Cominco] and any remedial obligations associated with those operations[.]" Parrish, *supra*, at 407. Under the Ninth Circuit's ruling, "Canadian environmental policy – to the extent that it imposes a different standard or a different method of regulation – would be undermined as Canadian companies would feel compelled to follow U.S. laws." *Id.* at 406. And Canada's environmental approaches are indeed different – as many U.S. laws (including CERCLA, the Clean Air Act, the Clean Water Act, and others) have no nationwide Canadian analogues. David R. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* 229 (2003). Moreover, as a general rule, "Canada's Constitution places more power in provincial hands than the U.S. Constitution gives to the states" – and provinces similarly do not

(Continued on following page)

results never intended by Congress – a disruption of: the joint management of trans-border environmental issues; bilateral relations among U.S., Canada, and Mexico; certainty and stability in the economic and business climate; and timely and cooperative efforts to improve North America's environment for all citizens.

At the top of this brief, we noted that the issue is not *whether* trans-border environmental issues need to be dealt with (they do), but *how* to do so. The *how* will not be advanced if the Ninth Circuit's decision is allowed to stand.

CONCLUSION

For the foregoing reasons, the Court should grant Teck Cominco's Petition for a Writ of Certiorari.

Respectfully submitted,

Dated: May 2, 2007

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IN THE

Supreme Court of the United States

TECK COMINCO METALS, LTD.,

Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, AND STATE OF WASHINGTON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million U.S. businesses and organizations from every region of the country. An important function of the Chamber is to advocate its members' interests in matters of national concern before all branches and at all levels of government. In this role, the Chamber has often filed briefs as *amicus curiae* before federal and state courts, including before this Court.

The Chamber seeks to highlight in this brief the importance of the present case to the U.S. business community and the negative consequences—both diplomatic and economic—that would flow from allowing the Ninth Circuit's flawed and expansive interpretation of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") to stand.

The complex problem of transboundary pollution has historically been addressed through a variety of bilateral and multilateral diplomatic mechanisms. By displacing these cooperative arrangements in favor of piecemeal litigation that projects U.S. environmental regulations abroad, the Ninth Circuit's ruling, if allowed to stand, not only would interfere with the foreign affairs prerogatives of the political branches of government, but also would disrupt the settled expectations of the business community.

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[1] No person other than the amicus curiae, its members, or its counsel has made any monetary contribution to the preparation or submission of this brief. Further, no counsel for any Petitioner or Respondent authored this brief in whole or in part. Counsel of record for both parties have consented to the filing of this brief *amicus curiae*, and the letters of consent have been filed with the Clerk.

Further, by extending CERCLA's statutory reach to activities carried out by a foreign company on foreign soil, the Ninth Circuit's decision risks provoking foreign governments to attempt to impose similar liability on U.S. companies for activities those companies undertake within the United States' borders. Such retaliation would seriously damage the interests of the Chamber's members doing business in the border regions of the United States and would inject uncertainty and unpredictability into the regulatory framework within which they operate.

The Chamber has a vital interest in promoting a predictable legal environment for its members—something that is seriously threatened by the Ninth Circuit's unprecedented expansion of CERCLA liability in this case.

BACKGROUND AND INTRODUCTION

This case raises an issue of critical importance to this nation's business community: the applicability of U.S. environmental laws to the conduct of foreign persons that takes place wholly within the sovereign territory of a foreign nation. This Court has long recognized – and reaffirmed just days ago – that acts of Congress are presumed "to apply only within the territorial jurisdiction of the United States," unless a "clearly expressed" contrary intention is apparent from the legislation. *EEOC* v. *Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 248 (1991) (quoting *Foley Bros. Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949) and *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353, U.S. 138, 147 (1957)); *Microsoft Corp.* v. *AT&T Corp.*, No. 05-1056, slip op. at 15-16 (U.S. Apr. 30, 2007). Instead of confronting directly the issue of whether Congress intended liability under CERCLA to apply to conduct that takes place exclusively outside the United States, the Ninth Circuit sidestepped the presumption against extraterritoriality altogether. See *Pakootas* v. *Teck Cominco Metals Ltd.*, 452 F.3d 1066, 1078 (9th Cir. 2006) (determining that the presumption against extraterritoriality

did not apply because the passive "release" of heavy metals from slag occurred domestically). That decision is not only inconsistent with existing law but also gives rise to serious diplomatic and economic implications; it requires this Court's review.

Notwithstanding the Ninth Circuit's attempt to avoid the question whether CERCLA can be applied extraterritorially, its decision implicates the very concerns that the presumption against extraterritorial statutory application was designed to guard against—namely, the "unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248. The question of whether to apply the presumption is more than simply an academic exercise. The Ninth Circuit's ruling extends CERCLA liability to a Canadian corporation whose conduct took place exclusively in the territory of Canada in compliance with Canadian law. This is a development with serious consequences for diplomatic relations between Canada and the United States, as well as for businesses on both sides of the border. And the potential consequences of the decision below extend well beyond the United States' relationship with its closest neighbor. The importance of the scope of the presumption against extraterritoriality, and the ramifications of the Ninth Circuit's failure to apply that presumption, make the need for this Court's review particularly evident.

REASONS FOR GRANTING THE PETITION

Almost a century ago, in *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909), Justice Holmes articulated the basic premise upon which the presumption against the extraterritorial application of U.S. law is based: "[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." *Id.* Since that time, this Court has consistently reaffirmed that the

presumption is directly implicated whenever a litigant attempts to apply U.S. law to *conduct* that takes place outside of the United States. See *Aramco*, 499 U.S. at 249-51 (Title VII of the Civil Rights Act of 1964 does not regulate the employment-related conduct of American firms employing American citizens abroad);[2] *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285-86 (1949) (federal labor statute does not apply to impose liability on a private contractor for conduct that took place in a foreign country); *Smith* v. *United States*, 507 U.S. 197, 204 (1993) (Federal Tort Claims Act does not apply to tort claims based on acts or omissions occurring abroad).

This Court recently emphasized the importance of this principle. Observing that "United States law applies domestically but does not rule the world," *Microsoft*, slip op. at 15, and that "foreign conduct is [generally] the domain of foreign law," *id.* (quoting Brief for the United States as *Amicus Curiae* at 28, *Microsoft*, No. 05-1056), this Court held that §271(f) of the Patent Act does not apply to activity occurring abroad. In so holding, the Court reiterated the presumption that "legislators take account of the legitimate sovereign interests of other nations when they write American laws." *Id.* at 15 (quoting *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004)).

Despite the undisputed fact that the conduct for which Petitioner, a Canadian company, is allegedly liable under CERCLA took place exclusively on foreign soil, the Ninth Circuit concluded that the presumption against extraterritoriality was not implicated at all here. The court reasoned that because the "release" of hazardous substances occurred in the United States, this case involved a purely

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[2] The Court's interpretation of Title VII in *Aramco* was superseded by Congress's enactment of the Civil Rights Act of 1991, Pub. 2, No. 102-166, 105 Stat. 1074, *as recognized in Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 251 (1994). That statutory revision, however, does not undermine the presumption against extraterritoriality as invoked in *Aramco*.

domestic application of CERCLA. *Pakootas*, 452 F.3d at 1078. That reasoning, however, took no account of the critical question of whether Congress intended CERCLA to impose liability for Petitioner's wholly extraterritorial conduct. Instead, the panel simply side-stepped this issue by defining the application of CERCLA in this case as "domestic."

The ascertainment of affirmative congressional intent is a necessary prerequisite for a U.S. court to apply U.S. statutory liability to conduct that occurs entirely outside the United States. See *Aramco*, 499 U.S. at 248 (holding that the presumption applies "unless there is 'the affirmative intention of the Congress clearly expressed'") (quoting *Benz*, 353 U.S. at 147)); *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 176 (1993) (affirming that the presumption requires "affirmative evidence of intended extraterritorial application"). Even in those instances in which this Court has determined that the presumption against extraterritoriality has been overcome, it has done so because it concluded that there existed an affirmative congressional decision to allow such an extraterritorial application. See, *e.g.*, *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 & n.22 (1993) (recognizing that Congress intended the Sherman Act to apply "to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"); *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 285, 287 (1952) (concluding that "Congress intended to make the [the Lanham Act] applicable to the facts of this case.") (internal quotation mark omitted)). In this case, the Ninth Circuit conducted no such inquiry into congressional intent to apply CERCLA liability to wholly foreign conduct.

The Ninth Circuit's determination that the presumption against extraterritoriality was inapplicable in this case is directly contrary to this Court's established precedent. That flaw is responsible for more than simply a wrong result or a legal inconsistency—it carries with it significant real-world

consequences for U.S. foreign policy (and the ability of the Executive branch to effectively conduct such policy) as well as for the U.S. business community. These consequences present compelling reasons for this Court to grant certiorari in this case.

I. THE LOWER COURT'S DECISION THREATENS INTERNATIONAL DISCORD AND INTERFERES WITH U.S. FOREIGN POLICY.

The presumption against the extraterritorial application of U.S. law is designed largely to prevent "unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248; see also *Spector* v. *Norwegian Cruise Line Ltd.*, 545 U.S. 119, 143 (2005) (Ginsburg, J. concurring in part and concurring in the judgment) ("[B]efore reading our law 'to run interference in such a delicate field of international relations,' 'where the possibilities of international discord are so evident and retaliative action so certain' the Court should await Congress' clearly expressed instruction.") (quoting *Benz*, 353 U.S. at 147)). This rationale has roots in the twin concerns of international comity, see *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004) ("[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."), and the separation of powers, see *Sale*, 509 U.S. at 188 ("[The] presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility."). In the "presence of highly charged international circumstances," *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963), the presumption serves to prevent a court from reading a statute "so as to give rise to a serious question of separation of powers which in turn would . . . implicate[] sensitive issues of the authority of the Executive over relations with foreign nations," *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S.

490, 500 (1979). These twin concerns are directly implicated in this case and compellingly support certiorari.

The Ninth Circuit's disregard of the presumption against extraterritorial statutory reach risks triggering serious diplomatic consequences. The Canadian government has already protested on international comity grounds the extension of CERCLA liability to Petitioner's exclusively Canadian operations. See Gov't of Canada's *Amicus Curiae* Brief in Support of Appellant and Reversal of the Order of the District Court, *Pakootas* v. *Teck Cominco Metals Ltd.*, 452 F.3d 1066 (9th Cir. 2006) (No. 05-35153). The reason for Canada's protest is clear: by projecting CERCLA's standards onto the sovereign territory of Canada, the panel's decision disrupts the integrity of a foreign country's environmental scheme by imposing upon it a potentially inimical set of priorities. This can only serve to harm relations between the United States and one of its most important allies. Cf. Arthur T. Downey, *Extraterritorial Sanctions in the Canada/U.S. Context*, 24 Can-U.S. L.J. 215, 215 (1998) ("[E]xtraterritoriality is an unwanted intrusion into a country's sovereignty, and Canada sometimes suffers nightmares about the firmness and durability of its own sovereignty. It naturally bristles when the ugly head of extraterritoriality appears, especially if it is an American head.").

The extraterritorial application of CERCLA also needlessly interferes with the foreign affairs prerogatives of the political branches of the U.S. government. Current U.S. foreign policy has recognized that the problem of cross-border pollution is best addressed through bilateral or multilateral diplomatic mechanisms. The reciprocal nature of the problem makes it inappropriate for resolution by the unilateral projection of the country's domestic laws onto its neighbors' territory. Instead, the United States and other countries have found it preferable, and very often successful, to pursue joint measures to reduce the overall output of pollutants into the shared natural

environment. The United States and Canada are parties to many regional and global agreements that address transboundary pollution through such cooperative efforts. See, *e.g.*, Memorandum of Intent Concerning Transboundary Air Pollution, U.S.-Can., Aug. 5, 1980, 32 U.S.T. 2521; Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979; 1978 Great Lakes Water Quality Agreement, U.S.-Can., Nov. 22, 1978, 30 U.S.T. 1383; 1972 Great Lakes Water Quality Agreement, Apr. 15, 1972, United States-Canada, 23 U.S.T. 301; 1909 Boundary Waters Treaty With Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448. The United States has also been involved in numerous negotiations addressing environmental problems in specific border areas. See generally John E. Carroll, *Environmental Diplomacy: An Examination and a Prospective of Canadian-U.S. Transboundary Environmental Relations* (1983) (describing the history of U.S.-Canadian cross-border environmental diplomacy).

As a result of these agreements and negotiations, there exists a robust network of inter-governmental mechanisms dealing with the problem of cross-border contamination. Most prominently, the 1909 Boundary Waters Treaty between the United States and Canada established a bilateral International Joint Commission that is charged with resolving disputes concerning the control of boundary water quality, including transboundary pollution, and is vested with quasi-judicial, investigative and arbitral functions. The subsequent Great Lakes Water Quality Agreements have expanded the powers of the Commission, and over the years the Commission has successfully resolved a number of disputes between the two countries. See L.H. Legault, *The Roles of Law and Diplomacy in Dispute Resolution: The IJC as a Possible Model*, 26 Can.-U.S. L.J. 47, 49-54 (2000); Shawn M. Rosso, *Acid Rain: The Use of Diplomacy, Policy and the Courts to Solve a Transboundary Pollution Problem*, 8 J. Nat. Resources & Envtl. L. 421, 424-25 (1993) ("The IJC has been

an innovative approach to dealing with common problems arising on the border. In effect, it has institutionalized an acknowledgement of the importance of cooperation in addressing common environmental issues.").

Characteristic of this successful cooperative approach to transboundary pollution is the Commission's investigation, upon a joint request by the United States and Canada, of the issue of air pollution in the Detroit river area, which encompasses the metropolitan areas of Detroit, in the State of Michigan, and Windsor, in the Province of Ontario. Having concluded that the responsibility for the pollution was shared by both sides, the Commission recommended, and the United States and Canada subsequently created, a joint institution to address the problem. See Int'l Joint Comm'n, *Detroit River Area of Concern: Status Assessment* (1997), *available at* http://www.ijc.org/php/publications/html/detroit.html; Rosso, *supra*, at 424.

A similarly extensive diplomatic system of dispute resolution has been established to address pollution on the U.S. and Mexican border. See Elia V. Pirozzi, *Resolution of Environmental Disputes in the United States-Mexico Border Region and the Departure from the Status Quo*, 12 J. Envtl. L. & Litig. 371, 373-86 (1997) (discussing dispute resolution under NAFTA, North American Agreement on Environmental Cooperation and Environmental Dispute Resolution, "La Paz" Agreement Between the U.S. and Mexico on Cooperation for the Protection and Improvement of the Environment in the Border Area, and Integrated Environmental Border Plan for the Mexican-United States Border Area). These agreements have allowed the two countries to solve a number of significant environmental problems in the border area. Under the "La Paz" agreement, for instance, a collaborative effort by the U.S. and Mexico has dramatically improved air quality in the El Paso-Ciudad Juárez border region, and has substantially reduced pollution from copper smelters in Arizona in the United States and

Sonora in Mexico. See Sanford E. Gaines, *NAFTA as a Symbol on the Border*, 51 UCLA L. Rev. 143, 161 (2003); John D. Wirth, *Smelter Smoke in North America: The Politics of Transborder Pollution* 175-99 (2000).

The Ninth Circuit's extension of CERCLA liability to Petitioner's wholly foreign conduct risks disrupting these and other well-functioning diplomatic schemes. It places a matter traditionally handled through diplomacy by the Executive into the hands of individual private litigants who can unilaterally pursue CERCLA suits without any regard for the foreign policy and international environmental consequences for the nation as a whole. The firmly established presumption against extraterritorial application of federal legislation, which the Ninth Circuit refused to apply, is designed to prevent precisely this dangerous and counterproductive exercise.

Absent a clear showing of congressional intent to apply federal law abroad, the authority to resolve the sensitive problem of cross-border environmental relations is vested in the federal Executive acting through its diplomatic representatives. Such authority is an element of the President's broader power to, in the words of the Solicitor General, "promote the effective conduct of foreign relations, and underscore the United States' commitment in the international community to the rule of law." Brief for the United States as *Amicus Curiae* Supporting Petition for Certiorari at 8, *Medellin* v. *Texas*, No. 06-984.

As the Fifth Circuit has observed in an analogous situation, when considering whether to give extraterritorial application to the Marine Mammal Protection Act of 1972:

> When Congress considers environmental legislation, it presumably recognizes the authority of other sovereigns to protect and exploit their own resources. Other states may strike balances of interests that differ substantially from those struck by Congress. The traditional method

> of resolving such differences in the international community is through negotiation and agreement rather than through the imposition of one particular choice by a state imposing its law extraterritorially.

United States v. *Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1977).

These mechanisms allow the Executive Branch to evaluate the nation's environmental priorities, to take account of the diplomatic sensitivities involved, and to respond in a manner that appropriately combines the determination and the flexibility necessary to solve the complex issues surrounding transboundary pollution. That responsibility, moreover, is particularly appropriate because "the President is uniquely positioned both to evaluate and resolve sensitive foreign policy issues and to act with dispatch." Brief for the United States as *Amicus Curiae* Supporting Petition for Certiorari at 12, *Medellin*, No. 06-984.

By contrast, this Court has emphasized the limited capacity of the Judicial Branch to "determin[e] precisely when foreign nations will be offended by particular acts" and has "consistently acknowledged that the nuances of the foreign policy of the United States ... are much more the province of the Executive Branch and Congress" than of the courts. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 386 (2000) (quoting *Container Corp. of Am.* v. *Franchise Tax Bd.*, 463 U.S. 159, 194, 196 (1983)) (internal quotation marks omitted) (alteration and omission in original).

The Ninth Circuit's failure even to consider, much less to apply the presumption against extraterritoriality in this case fosters not only unnecessary tension between governments but also inappropriate conflict between the U.S. branches of government, as the judiciary attempts to tread where it "has neither aptitude, facilities nor responsibility." *Chicago & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

II. THE DECISION BELOW WILL HAVE SUBSTANTIAL ADVERSE CONSEQUENCES FOR THE BUSINESS COMMUNITY.

Regardless of whether the application of CERCLA in this case is labeled as "domestic" or "extraterritorial," by attaching liability to conduct that occurred wholly outside the United States, the Ninth Circuit's decision will detrimentally affect many of the Chamber's members and affiliates, as well as the U.S. business community in general. United States companies and individuals are actively engaged in business operations in the regions bordering Canada. These companies will be exposed to substantial risk if, in response to this and similar suits against its nationals, Canada retaliates by extending its own environmental laws to U.S. companies operating on the U.S. side of the border and by opening its courts to similar types of lawsuits.

The Ninth Circuit's projection of CERCLA abroad effectively subjects foreign companies operating outside the United States to the U.S. environmental regulatory regime. There is no way to escape that consequence of the Ninth Circuit's decision, given that CERCLA relies on regulating conduct that gives rise to releases of pollution. See Memorandum from Marianne L. Horinko, Assistant Administrator, U.S. EPA, to Superfund Nat'l Policy Managers, Regions 1-10 & RCRA Senior Policy Advisors, Regions 1-10, at 2-3 (Feb. 12, 2002) ("Principles for Managing Contaminated Sediment Risks at Hazardous Waste Site"); U.S. EPA, *Contaminated Sediment Remediation Guidance for Hazardous Waste Sites* § 2.6 (2005), *available at* http://www.epa.gov/superfund/resources/sediment/pdfs/guidance.pdf ("Identifying and controlling contaminant sources typically is critical to the effectiveness of any Superfund sediment cleanup.").

If private litigants are permitted to use CERCLA lawsuits to target foreign companies' operations outside of the United States, these companies will find themselves forced to

conform their conduct to U.S. environmental requirements for fear of liability. They will have to do so even if those U.S. requirements find no correlation in the domestic legislation of the country in which they operate.

As a result, Canadian companies faced with the unexpected requirement to comply not only with their country's domestic regulation but also with CERCLA (and, potentially, other U.S. environmental statutes) when acting solely on Canadian soil will have every incentive to pressure their government to respond. See Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. Rev. 363, 414 (2005) ("Little reason exists to believe that Canada would not ultimately respond similarly if the U.S. CERCLA laws are read to apply extraterritorially to Canadian companies doing business solely in Canada."). The Ninth Circuit's insistence that this case involves only a "domestic" application of CERCLA is cold comfort to Canadian companies and is unlikely to alleviate this cross-border tension, given that under that court's approach CERCLA liability can attach to conduct exclusively outside the United States.

In response, Canada could very well try to "level the playing field" between companies on either side of the border by imposing corresponding liability on companies operating within U.S. territory whenever their operations produce pollution that later ends up in Canada. Canada already contends that pollutants released by some U.S. companies migrate across national boundaries and account for air and water pollution in certain regions of Canada. See Env't Can., *Comments on the U.S. EPA's Proposed National Emission Standards for Hazardous Air Pollutants* (Mar. 30, 2004), *available at* http://www.ec.gc.ca/mercury/en/mcepa.cfm# ECC (reporting that 10 percent of the mercury deposited in Canada each year comes from U.S. sources); Michael S. McMahon, *Balancing the Interests: An Essay on the*

Canadian-American Acid Rain Debate, in International Environmental Diplomacy: The Management and Resolution of Transfrontier Environmental Problems 147, 147 (John E. Carroll ed., 1988) ("The issue [of acid rain] has been identified by Canada's minister of the environment as the 'single most important irritant in US-Canadian relations.'"). If Canada wishes to retaliate for the Ninth Circuit's unwarranted intrusion into its sovereignty, it will find an easy basis under that court's reasoning for imposing liability upon U.S. businesses. The risk that Canada would open the door to proceedings against U.S. companies, premised on the U.S. companies' failure to comply with Canadian environmental standards in their domestic U.S. activities, will severely undermine business confidence.

The resulting instability in the governing regulatory framework likely will disrupt existing projects in the border regions and deter companies from undertaking new ones. The need to become familiar with foreign laws and regulations, and to conform domestic company activities to these requirements, would impose a significant informational and operational cost on all businesses in the border regions. Likewise, the prospect of inconsistent lawsuits and liability verdicts would inflict considerable damage on the economic cooperation between the United States and Canada and decrease the prospects for bilateral investment.

Furthermore, the Ninth Circuit's extraterritorial application of CERCLA is potentially unbounded. If CERCLA liability can attach any time pollution eventually ends up in the United States regardless of its source, it could be easily extended to cover air and water pollution emanating from non-border countries. Cf. Rebecca Renner, *Science News: Asia Pumps Out More Mercury than Previously Thought*, Envtl. Sci. & Tech. Online (American Chemical Society), Jan. 5, 2005, *available at* http://pubs.acs.org/subscribe/journals/esthag-w/2005/jan/science/rr_asia.html (discussing scientific investigation of long-range transport of atmospheric

pollutants from Asia); Nordic Council of Ministers, *Lead Review* 11 (2003) (reporting to the United Nations Environment Programme on the long-range air transport of lead emissions); Nordic Council of Ministers, *Cadmium Review* 9 (2003) (reporting on the long-range air transport of cadmium). Given the sweeping nature of cross-border contamination, a limitless range of foreign companies operating solely on foreign soil could be captured by the Ninth Circuit's expansive interpretation of our domestic laws. Correspondingly, the Ninth Circuit's rationale would permit any foreign nation that can trace at least some of its environmental pollution to economic activity occurring in the United States to subject the alleged polluter to protracted litigation and potential liability in that country. The risk of retaliation against U.S. companies thus extends well beyond the United States' closest neighbors.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

TECK COMINCO METALS, LTD.,
a Canadian corporation,

Petitioner,

v.

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; STATE OF WASHINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF CONSUMER ELECTRONICS ASSOCIATION IN SUPPORT OF PETITIONER

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Maj. George J. Konoval, *"Electronic Waste Control Legislation: Observations on a New Dimension in State Environmental Regulation*, 58 Air Force L. Rev. 147 (2006) 6

U.S. EPA Report, "Electronics Waste Management In the U.S." (May 1, 2006), published at http://www.epa.gov/ecycling/manage.htm 5

INTEREST OF AMICUS CURIAE

Amicus curiae Consumer Electronics Association ("CEA") is the preeminent trade association of the United States consumer electronics industry. It has more than 2000 members, the overwhelming majority located in the United States, involved in all aspects of the consumer electronics industry in North America and overseas. CEA members are involved in the design, development, manufacturing, distribution and integration of audio, video, in-vehicle electronics, wireless and landline communication, information technology, home networking, multimedia and accessory products, as well as related services that are sold through consumer channels. CEA's members contribute over $125 billion to the US economy annually.[1]

For many years, CEA and its member companies have supported responsible recycling of used electronics products. That policy requires that safe and reliable methods of recycling "e-waste" be available. The petitioner here, Teck Cominco Metals, Ltd., is in the early stages of development of a program to use its existing facilities at the Trail Smelter in British Columbia (the facility at issue in this case) to recycle e-waste, using shredded electronics components in one of Teck Cominco's smelters. The plastic and wood components of the waste burn, generating heat recovered in steam boilers. The metals are recovered through the

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1. No counsel for any party authored this brief. No person or entity, other than amicus curiae Consumer Electronics Association, made a monetary contribution to the preparation or submission of this brief. Amicus curiae has previously submitted letters from counsel for the respondents consenting to the filing of this brief. A letter consenting to the filing of all amicus curiae briefs by counsel for the petitioner is on file with the Court.

metallurgical processes in the furnace, while the residual material is blended with the ferrous granules that result from other smelting processes and are used in the production of cement.

CEA has a keen interest in the success of Teck Cominco's e-waste recycling project, as well as in the development of other environmentally responsible e-waste disposal methods. By imposing CERCLA liability for activities conducted outside the United States, however, the Ninth Circuit's decision in this matter directly threatens the viability of Teck Cominco's pilot project. Indeed, the decision, if allowed to stand, may well shut down Teck Cominco's recycling project. Such a shutdown could divert more and more e-waste away from beneficial reuse and into landfills, where it may present environmental problems if not properly managed.

Equally important, CEA is concerned that the Ninth Circuit's approach will spark "tit for tat" retaliation. If this country's environmental laws are applied to conduct that takes place outside its borders, it is reasonable to assume that other countries will enact or enforce laws that hold American companies liable for pollution that takes place entirely in this country but travels through the air, earth or water to other countries. Indeed, the Canadian government has already warned the Environmental Protection Agency of the potential for retaliatory action in its response to EPA's issuance of a CERCLA order to Teck Cominco. Pet. App. 100a.

Since the United States is a net exporter of pollution, this means that businesses in this country might be forced to divert resources from ameliorating the pollution they produce inside the United States to complying with "extraterritorial"

pollution laws outside the United States, notwithstanding that these businesses are fully compliant with American environmental law. The possibility of "extraterritorial" pollution liability may well threaten the economic viability of the activities of many CEA members, particularly those located in border states.

CEA believes that cross-border pollution issues are better dealt with by intergovernmental negotiation than by private litigation, and believes this Court should consider the adverse consequences resulting from the Ninth Circuit's decision.

Further, CEA has for many years advocated that policymakers attempt to set a national recycling and waste-disposal policy for e-waste, rather than relying on the current inefficient patchwork of state-by-state regulation. The Ninth Circuit's decision will in effect impose a similar patchwork regulatory scheme for the regulation of cross-border pollution, with judicial decisionmaking in private litigation dictating transboundary waste management policy for both the U.S. and neighboring sovereigns. That approach has not been sanctioned by Congress and should not be adopted by judicial fiat.

The CEA thus urges this Court to grant the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Disposal of used electronic components, or "e-waste," is a serious problem in the United States. When e-waste is not recycled, it ends up in landfills, where it can pollute groundwater if not managed properly. As the largest trade organization for the consumer electronics industry in the United States, CEA supports responsible recycling of e-waste. Unfortunately, the decision at issue here threatens the viability of a promising method for recycling e-waste.

Teck Cominco, the petitioner, is currently testing a pilot program to recycle e-waste in one of the smelters at its Trail, British Columbia plant. The experimental process recycles the metals found in e-waste and completely disposes of non-metal components. The pilot program has been developed in consultation with and is permitted by the British Columbia government.

By imposing CERCLA liability on Teck Cominco for activities taking place entirely outside the United States, the Ninth Circuit decision at issue here threatens the viability of the Teck Cominco experimental recycling project. If the decision stands, Teck Cominco may well be forced to cancel or suspend its e-waste recycling project. The result, ironically, will be more potential pollution problems in the United States, as e-waste is sent to landfills rather than recycled.

Moreover, the Ninth Circuit decision threatens retaliation by other countries. If a business can be held liable in the United States for "polluting" conduct that occurred wholly outside the United States and was in compliance with environmental laws in the country where the conduct took place, American-based businesses can equally be held liable

in other countries for the environmental consequences of their acts inside the United States. If such "tit for tat" environmental regulation should become common, CEA's members and other American-based businesses will suffer, as will the environment in the United States.

The best solution to transboundary pollution problems is diplomacy. The Ninth Circuit decision commits such problems to the vagaries of private litigation and should be reversed.

ARGUMENT

I. The Ninth Circuit Decision Imperils A Promising Method of Recycling E-Waste.

The U.S. Environmental Protection Agency estimates that over 2 million tons of waste from discarded electronics components is generated each year in the United States. U.S. EPA Report, "Electronics Waste Management In the U.S." (May 1, 2006).[2] This "e-waste" may contain appreciable levels of lead, mercury, cadmium, arsenic and other compounds which, if not disposed of properly, can create environmental problems.[3] Moreover, e-waste is a valuable source for secondary raw materials. *See*, Maj. George J.

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2. This report can be found at http://www.epa.gov/ecycling/manage.htm.

3. For example, the Environmental Protection Agency has noted that "[t]elevisions and color computer monitors contain an average of 4 pounds of lead," as well as other constituents such as mercury, cadmium and arsenic. "Hazardous Waste Management System; Modification of the Hazardous Waste Program; Cathode Ray Tubes," 71 Fed.Reg. 42928-01, 42930, 42931 (July 28, 2006).

Konoval, "*Electronic Waste Control Legislation: Observations on a New Dimension in State Environmental Regulation*, 58 Air Force L. Rev. 147, 152-53 (2006) (noting that one metric tonne of computer scrap contains between 50 and 800 times the concentration of gold in gold ore and 30 to 40 times the concentration of copper in copper ore). The vast majority of this waste currently is not recycled, and in many instances, ends up in landfills. If not managed properly in landfills, metals and possibly harmful chemicals can leach from e-waste into the soil or groundwater. *Id.* at 150-51.

Amicus curiae CEA has long advocated for responsible solutions to the problem of e-waste. Indeed, CEA believes that a consistent, environmentally-responsible policy for disposing of e-waste is vital to the economic health of the consumer electronics industry. CEA has generally supported market-based solutions to the problem and strongly supports efforts to create recycling programs in the United States. CEA has long advocated a national solution to the issue of e-waste, and in particular has sought a uniform national policy, to prevent a welter of possibly-inconsistent state regulations.

Consistent with this approach, CEA has a special interest in a pilot program now being implemented at the Teck Cominco smelter in Trail, British Columbia. Teck Cominco has designed an innovative process that allows complete destruction or recovery of e-waste. In Teck Cominco's process, shredded electronic components are placed in an existing smelter, where the combustible wood and plastic materials burn at high temperatures as fuel, generating heat that is recovered in steam boilers. The metals present, including copper, iron, nickel, palladium, platinum, silver and gold, are recovered through metallurgical processes.

Residual material is blended with ferrous granules that are the end product of re-refining the "slag" produced by zinc smelting; these granules are then used in the manufacture of cement. Throughout the process, resulting gases are scrubbed and cleaned.[4]

Teck Cominco's pilot project will recycle up to 3000 metric tonnes of e-waste per year. *See*, South Kootenay Interview. Teck Cominco is hopeful that, if the pilot project is successful, it will be able to "scale-up" to 20,000 tonnes per year, an amount equal to 10% of the e-waste annually produced in Canada. *Id.* Depending upon economies of scale, Teck Cominco may ultimately be able to recycle as much as 60,000 tonnes of e-waste annually.

The pilot e-waste recycling project has been conducted in cooperation with and is fully permitted by the British Columbia government.

If the pilot project succeeds, CEA is hopeful that other metal refiners in North America will follow Teck Cominco's lead, thus making it possible to recycle e-waste throughout the continent without the potential adverse environmental effects caused by improper disposal of e-waste. At present, however, only two other such metal-refining recycling projects exist, one in Québec and another in Sweden. *See* South Kootenay Interview.

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4. Teck Cominco's e-waste recycling process is described in an interview with Susan Knoerr, Manager, Technical and Business Development, and David Goosen, Business Development Superintendent, Teck Cominco, published at *http://www.southkootenay.com/cms/Teck_Cominco_Q_A.400.0.html* (hereafter, "South Kootenay Interview").

CEA thus has a keen interest in the success of Teck Cominco's pilot recycling project. CEA believes that the Ninth Circuit decision that is the subject of the petition for certiorari imperils that project. The Ninth Circuit essentially held that a foreign business operating entirely outside the United States can be held liable for violations of United States environmental laws if *any* pollutants discharged by that business enter the United States. Because there is no such thing as a "zero discharge facility," the practical effect of such a ruling is that foreign businesses concerned that any pollution they produce might migrate to the United States—through the atmosphere, freshwater or coastal seawater—will have to shut down production. Thus, even though Teck Cominco is discharging whatever waste it may produce at its Trail Smelter in compliance with environmental permits from the Province of British Columbia, there is a very real danger that Teck Cominco will have to discontinue its pilot e-waste recycling project if the Ninth Circuit's decision stands.

If Teck Cominco cannot continue its pilot project, CEA's members—and the American public—will have lost one of the most promising avenues for the disposal of the increasing quantities of e-waste. The result, ironically, will be *more* potential pollution problems, in the form of landfill waste in North America that must be managed and monitored.

The issue here is not a matter of allowing unchecked "offshore" pollution; as noted, the Teck Cominco pilot project has been developed in consultation with and conducted under a permit from the British Columbia government. But under the Ninth Circuit's reasoning, Teck Cominco may be held liable in the United States for conduct that is fully consistent with the environmental laws of the country in which that

conduct took place.[5] The result will be *more* landfill waste and *more* potential environmental problems in the United States than would be the case if this country's environmental laws had not been applied to Teck Cominco. Such a result is perverse.

II. The Ninth Circuit Decision Threatens "Tit for Tat" Retaliation From Other Countries.

Leaving aside its impact on Teck Cominco's pilot e-waste recycling project, CEA is concerned about the broader impact of the Ninth Circuit ruling on its members caused by the likely response of other governments to the Ninth Circuit's overreaching. When a court in the United States applies this country's environmental statutes to conduct that occurs outside the country's borders, it invites "tit for tat" retaliation by other countries.

If American environmental laws can be applied to make foreign corporations operating entirely outside the United States liable for the American effects of their foreign conduct, other nations may soon enact or interpret their laws to make

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5. Indeed, Teck Cominco is in a *worse* situation concerning potential CERCLA liability than an American manufacturer. While an American manufacturer might be able to receive a permit under the Clean Water Act or the Clean Air Act that would exempt it from liability under CERCLA (*see* 42 U.S.C. § 9607(j), exempting any "federally permitted release"), such a permit would not be available to Teck Cominco for operations in Canada (*see, e.g.*, 33 U.S.C. § 1342, allowing permits for discharges of pollutants into "navigable waters," which are defined in 33 U.S.C. § 1362(7) as "waters of the United States"). Thus, Teck Cominco might be held liable under CERCLA for conduct in Canada that would not be actionable if that conduct took place in the United States.

manufacturers based in the United States liable for the foreign effects of their activities inside this country. Indeed, the record in this case demonstrates precisely this danger. The Canadian government warned in a diplomatic note responding to the EPA's administrative order requiring Teck Cominco to begin a CERCLA assessment that the EPA order "may set an unfortunate precedent, by causing transboundary environmental liability cases to be initiated *in both Canada and the United States*." Pet. Appx. 100a, emphasis added. The obvious import of the emphasized language is that, absent diplomatic resolution, transboundary pollution disputes might well embroil manufacturers based in the United States in private litigation in Canada and elsewhere.

The danger of this sort of action is that even if a business is operating in full compliance with American environmental laws, it remains potentially liable for "offshore" pollution caused by its permitted conduct. Such offshore liability might well have devastating effects on the members of CEA. The American consumer electronics industry is the largest in the world and its members are proud of their record of compliance with United States environmental law. However, because of its sheer size, the American electronics industry is vulnerable to claims by foreigners that conduct in the United States violated environmental laws elsewhere.

If the Ninth Circuit's ruling stands, foreign plaintiffs might well sue U.S. businesses for purported environmental wrongs occurring outside the United States, even if the "polluting" conduct took place entirely inside the United States in compliance with American environmental laws. Such a result would not only be unfair, it would divert resources that businesses in the United States devote to pollution control in this country to pay for environmental amelioration or compliance overseas.

CEA believes that disputes over transboundary pollution are best resolved by government-to-government negotiation, rather than through private litigation. Indeed, the record of bilateral negotiation between the United States and Canada over environmental issues, discussed in detail in Teck Cominco's petition for certiorari, is admirable. The Ninth Circuit decision threatens to upset this established regime. The decision is not only potentially counterproductive from an environmental point of view, but destructive from a foreign policy perspective.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 06-1188

IN THE

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TECK COMINCO METALS, LTD.,

Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, AND STATE OF WASHINGTON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF OF THE GOVERNMENT OF CANADA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

TECK COMINCO METALS, LTD.,

Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, AND STATE OF WASHINGTON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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This Brief *amicus curiae*,[1] submitted in support of Petitioner Teck Cominco Metals, Ltd. ("Petitioner") with the written consent of both Petitioner and Respondents Pakootas, Michel and the State of Washington, addresses the first question presented by Petitioner.[2] Canada views the Ninth Circuit's holding that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607, can be applied and enforced unilaterally to extend liability to a Canadian company for the ultimate

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[1] No counsel for a party authored this Brief in whole or in part. No person other than the *amicus curiae* made a monetary contribution to the preparation or submission of this Brief.

[2] The second question raised in the Petition for Certiorari appears to present purely a matter of United States law, which Canada believes to be more appropriately for the parties to address.

consequences of its actions in Canada as failing to consider three relevant and important international law issues: long-standing diplomatic practice and treaties between Canada and the United States, comity of nations and the related international law norm of national treatment. Because Canada believes its views on a matter of significant concern to the Government of Canada and its citizens would materially assist this Court in deciding the Petition, Canada respectfully submits this Brief, addressing these issues and their application to this and similar cases.

THE INTEREST OF *AMICUS CURIAE* THE GOVERNMENT OF CANADA

Canada is the sovereign state in which Petitioner is domiciled and which, together with the province of British Columbia, is responsible for regulating the conduct of Petitioner. Canada therefore has an interest in ensuring that the present dispute is dealt with through a process consistent with the established approach to Canadian-U.S. transboundary environmental concerns, which have long been addressed through bilateral cooperation. As sovereign, Canada also has a strong interest in seeing that principles of international law and comity are respected in the resolution of transboundary disputes.

Specifically, the Canadian Government has a compelling interest in preserving the viability of diplomatic mechanisms for resolving disputes with the United States that implicate boundary issues. These mechanisms include a valid treaty to which Canada and the United States are parties and other internationally recognized procedures available to both countries. In this case, where there are well-established diplomatic procedures and precedents for resolving issues of transboundary water pollution, including through bilateral negotiations or pursuant to the Treaty

Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448, CUS 312 (the "Boundary Waters Treaty"), the issue raised by the Petition presents a matter of recurring and special importance to the Government of Canada.[3]

Regardless of the particular method of non-judicial resolution, Canada has a vital sovereign interest in having this dispute settled through diplomatic measures, rather than by unilateral adjudication in the domestic courts of the United States.[4] The Government of Canada also has a strong

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[3] As noted in the Petition for Certiorari, in June 2006, Petitioner and the United States Environmental Protection Agency ("EPA") reached a settlement outside the framework of CERCLA. Petition for Certiorari at 5. The settlement, which was the culmination of years of concerted diplomatic efforts by Canada and the United States, resulted in EPA's withdrawal of its Unilateral Administrative Order against Petitioner (the "UAO") and the agreement that an affiliate of Petitioner based in the United States would conduct a comprehensive study of the environmental effects of the pollutants discharged from the Canadian smelter at issue in this case. App. to Pet. Cert. 120a. Despite the extra-judicial resolution of the dispute between EPA and Petitioner, outside the context of CERCLA, plaintiffs in this case continue to seek injunctive relief to enforce the UAO against Petitioner and compelling Petitioner to take actions to correct its alleged violations of the UAO and CERCLA. *Id.* at 118a-119a. *See Pakootas* v. *Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1071 n.10 (9th Cir. 2006). Plaintiffs also seek a declaratory judgment that Petitioner has violated and continues to violate CERCLA, civil penalties "to the maximum extent permitted by CERCLA" for each day that Petitioner allegedly violated the UAO and attorneys' fees. App. to Pet. Cert. 118a-119a; *see Pakootas*, 452 F.3d at 1071 n.10. Canada continues to have an interest in the bilateral resolution of these outstanding disputes in accordance with established diplomatic practices of Canada and the United States in these particular circumstances.

[4] Notwithstanding Canada's strong interest in a bilateral, diplomatic resolution of this dispute, rather than a unilateral adjudication by private parties in a United States court, the Government of Canada does not condone – indeed it disagrees with – Petitioner's assertions that the Ninth Circuit's decision "could provoke retaliatory actions against American interests by Canada or her courts," or affect Canada's policy regarding its

interest in preserving its sovereign right to regulate Canadian persons and companies operating in Canada, without interference from private lawsuits in U.S. courts.

Canada confines itself to arguments based in international law and does not address United States law, except where helpful to elucidate international law principles.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in failing to consider the existing framework for diplomatic resolution of the issues raised by the private plaintiffs in this suit, as well as fundamental principles of comity and customary international law respecting non-interference by one sovereign with the internal affairs of another sovereign, and equitable principles of equal treatment of nationals and non-residents. The court of appeals refused to consider these important legal norms even though it admitted that "'neither a logician nor a grammarian will find comfort in the world of CERCLA,'" *Pakootas*, 452 F.3d at 1079-80 (quoting *Carson Harbor Vill., Ltd.* v. *Unocal Corp.*, 270 F.3d 863, 883 (9th Cir. 2001)), and that certain provisions of the statute contain language that "is by no means clear" – which, indeed, "does not make literal or grammatical sense as written." *Id.* at 1080. Thus, the Court of Appeals held that CERCLA applied in this case to a Canadian company that conducts all of its operations in Canada, even thought it acknowledged that the text of the statute "does not indicate whether foreign corporations are covered," indeed, that "CERCLA is silent

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military presence in Afghanistan, which were made without the knowledge or sanction of the Government of Canada and reflect a complete misunderstanding of Canadian governmental policy and process. Petition for Certiorari, at 21, 22.

about *who* is covered by the Act." *Id.* at 1076, 1077 (emphasis in original). The Ninth Circuit admittedly broke new ground regarding the applicability of CERCLA without once giving weight, or even thought, to precedent for deciding similar disputes diplomatically or to principles of comity and customary international law.

Given the facts, and the novelty of the legal issues raised by this case and the Ninth Circuit's decision, Canada's preferred approach is to have the present transboundary environmental dispute resolved completely and finally through established diplomatic channels, not through a private lawsuit in the courts of the United States. The United States likewise has determined not to proceed by litigation; EPA and Petitioner have reached an extra-judicial resolution of the dispute, outside the framework of CERCLA. *See supra* note 3; Petition for Certiorari, at 5.

A government-to-government resolution of the pending disputes, as proposed by Canada in this Brief and in its prior *amicus curiae* submission to the Ninth Circuit, has the advantage of promoting comity by enabling a balance to be achieved between, on the one hand, Canada's interests in maintaining water quality in Canada and preserving its sovereign right to regulate Petitioner's operations in Canada, and, on the other hand, the United States's interest in water quality within its own sovereign territory. Government-to-government resolution would also help to ensure avoidance of future conflicts and inconsistencies in the application of the two countries' laws by substituting cooperation for unilateral action. A cooperative approach will also have the benefit of giving companies operating on both sides of the border confidence that they will not be risking liability under the unfamiliar laws of the neighboring country. The result of the Ninth Circuit's decision interpreting CERCLA in such a way that the statute can be pronounced to be non-extraterritorial is that companies located along the border

remain vulnerable to the risks and burdens of both sovereigns' regulations, which may be in conflict.

Canada recognizes the possibility that some cases involving transboundary pollution may appropriately be resolved in the domestic courts of Canada or the United States. This is not such a case, however, as the settlement between Petitioner and EPA emphasizes. *See supra* note 3; Petition for Certiorari, at 5. Resolution through private litigation is both unnecessary and, in this case, incompatible with the basic principle of comity of nations, as recognized and applied by Canadian and United States courts for centuries.

Leaving complete resolution of the underlying transborder issues to diplomatic or treaty mechanisms would have the additional benefit of furthering comity by avoiding application of CERCLA to Petitioner in circumstances that offend the international law norm of national treatment.

Accordingly, this Court should grant the Petition for a Writ of Certiorari and reverse the decision of the Ninth Circuit, so that the issues in this case can be resolved completely and finally between the two affected sovereigns, or at least, be resolved in a way consistent with international legal norms and considerations of comity.

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THAT TRANSBOUNDARY ENVIRONMENTAL ISSUES SHOULD BE RESOLVED THROUGH STATE-TO-STATE BILATERAL COOPERATION AND NOT THROUGH PRIVATE LITIGATION.

Traditionally, Canada and the United States have worked cooperatively to solve transboundary environmental issues through bilateral negotiations or pursuant to the Boundary Waters Treaty, which plainly applies in this case.[5] The Treaty created the International Joint Commission (the "IJC"), which has had a long, successful history of operation. *See, e.g.*, Trail Smelter Arbitration, (U.S. v. Can.), 3 R.I.A.A. 1905 (1938-1941), reprinted in 35 Am. J. Int'l L. 684 (1941).[6]

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[5] Article IX of the Boundary Waters Treaty provides that Canada and the United States "agree that . . . matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, *shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.*" Boundary Waters Treaty, art. IX, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448, CUS 312 (emphasis added). It is common practice for the countries to submit a joint reference to the International Joint Commission to encourage acceptance by both parties of the Commission's recommendations.

[6] The Trail Smelter Arbitration, in which the IJC managed an air pollution dispute between Canada and the United States, is widely regarded as a highly successful, seminal decision in international law. *See* Austen L. Parrish, *Trail Smelter Deja Vu: Extraterritoriality,*

The Ninth Circuit gave a nod to the past success of extra-judicial resolution of transboundary environmental disputes concerning air pollution between Canada and the United States, through arbitration, with respect to the specific source of pollution complained of in this case – the Trail Smelter located and operating in Trail, British Columbia. *See Pakootas*, 452 F.3d at 1069 n.5. The Ninth Circuit nevertheless rejected Canada's suggestion (in a brief *amicus curiae*) that a diplomatic, non-judicial resolution should be pursued in this case, rather than extending the reach of CERCLA. In doing so, the court not only ignored the fact that the IJC was created for the specific purpose of resolving disputes such as the one underlying this case, but also that the IJC has, over time, maintained consistent credibility with Canada and the United States. *See, e.g.*, Parrish, *supra*, at 417-18 & n.289.[7]

Indeed, the longstanding practice of the two countries has been to deal through diplomatic means with environmental issues of mutual concern. The ongoing Canadian-United States cooperation regarding environmental issues is evidenced by the 1972 Agreement on Great Lakes Water Quality, Apr. 15, 1972, U.S.-Can., 23 U.S.T. 301, CTS 1972/12. Canada and the United States have also entered into the Agreement Concerning the Transboundary Movement of Hazardous Waste, Oct. 28, 1986, Can.-U.S., T.I.A.S. No. 11,099, CTS 1986/39, and the Canada-United

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International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes, 85 B.U. L. Rev. 363, 420 & n.306 (2005) (quoting Alfred Rubin as stating that "[e]very discussion of the general international law relating to pollution starts, and must end, with a mention of the Trail Smelter Arbitration").

[7] Canada and the United States have also entered into a Treaty Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, U.S.-Can., 15 U.S.T. 1555, CTS 1964/2, Article XVI of which provides for resolution of disputes by reference by either sovereign to the IJC.

States Joint Inland Pollution Contingency Plan, July 25, 1994, U.S.-Can.,[8] to address spills and other environmental emergencies along the Canada-United States border. Canada and the United States each implemented the Convention for the Protection of Migratory Birds, Aug. 16, 1916, U.S.-Gr. Brit. (for Canada), 39 Stat. 1702, CUS 465, and the Agreement on Air Quality, Mar. 13, 1991, U.S.-Can., 30 I.L.M. 676, CTS 1991/3.[9] Both countries are also parties to the Memorandum of Agreement on Shellfish Sanitation, Mar. 4, 1948, U.S.-Can., T.I.A.S. No. 1747, CTS 1948/10.

These treaties, and a long history of bilateral cooperation, underscore the unique potency of non-judicial resolution of the issues before this Court. Moreover, the Boundary Waters Treaty directly addresses the issues raised by plaintiffs in this case. As noted previously, Article IX of the Treaty provides that "whenever" either sovereign requests that "questions or matters of difference" regarding their common boundary be referred to the IJC for examination and report, such questions or matters "shall be [so] referred." Boundary Waters Treaty, art. IX, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448, CUS 312. In the spirit of bilateral cooperation, all references to date have been joint.

In these circumstances, the Ninth Circuit's ruling that this case may proceed under CERCLA, in United States courts, in derogation of the procedures that both Canada and the United States have endorsed in the past, and which Canada proposed in this instance, clearly disregarded the fundamental rules of comity.

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8 *Available at* http://yosemite.epa.gov/oswer/ceppoweb.nsf/vwResourcesByFilename/jcpcan.pdf/$File/jcpcan.pdf (last visited April 30, 2007).

9 Since its creation, the IJC's jurisdiction has included air emissions, which can also have a damaging effect on boundary and transboundary waters. The Agreement on Air Quality has enabled action on acid-rain causing emissions by both countries and on ground level ozone (smog).

II.

THE COURT OF APPEALS ERRED BY PRESUMING THE APPLICATION OF CERCLA WITHOUT CONSIDERING THE PRINCIPLE OF COMITY OF NATIONS.

A. The Principle of Comity of Nations.

The United States Supreme Court has acknowledged the importance of comity of nations since the earliest days of its jurisprudence. The formulation of comity that is perhaps most pertinent in this case is that articulated by the Court in *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, 482 U.S. 522, 544 n.27 (1987), describing comity as "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." While comity is not "a matter of absolute obligation" that courts must always follow, it is equally not a matter "of mere courtesy and good will." *Hilton* v. *Guyot*, 159 U.S. 113, 163-64 (1895). It is, rather, "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Id.*

Principles of comity are also firmly established in Canadian jurisprudence. Indeed, as the Supreme Court of Canada has observed, "[t]he notion of comity has retained its vitality in the jurisprudence of Canadian courts." *Spar Aerospace Ltd.* v. *Am. Mobile Satellite Corp.*, 4 S.C.R. 205, 219 (Can. 2002).

The Supreme Court of Canada has repeatedly defined comity in terms that echo decisions of this Court. In *De Savoye* v. *Morguard Investments Ltd.*, 3 S.C.R. 1077, 1096 (Can. 1990), the Supreme Court recognized that "'[c]omity'

in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Id.* Rather, because it is founded on "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws," comity cannot legally be disregarded. *Id.* (citing *Hilton*, 159 U.S. at 163-64). *See also Pro Swing Inc.* v. *Elta Golf Inc.*, 2006 A.C.W.S.J. 157, at **26 (Can. 2006) (invoking the definition of comity developed by the United States Supreme Court in *Hilton*, 159 U.S. at 163-64); *Spar Aerospace*, 4 S.C.R. at 219 (same).

As the Supreme Court of Canada explained in *Morguard*, 3 S.C.R. at 1097, "[t]he ultimate justification for according some degree of recognition" to the laws of other nations "is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted." (Internal citations omitted). *See also Amchem Prods. Inc.* v. *British Columbia Workers' Comp. Bd.*, 1 S.C.R. 897, 913-14 (Can. 1993).

B. The Ninth Circuit Ignored Comity In Concluding That CERCLA Could Be Applied to Petitioner In This Case.

The Ninth Circuit's disregard of these well-established principles was particularly improper in this case. The court of appeals expressly acknowledged that the text of CERCLA is far from clear, in noting specifically that the statute lacks any indication that Congress intended it to be applied to foreign corporations. *Pakootas*, 452 F.3d at 1076,

1077, 1079-80. For that reason, the court chose to interpret CERCLA in a manner that ostensibly made its application non-extraterritorial.

Regardless of its nomenclature, the Ninth Circuit's decision nevertheless subjects Canadian companies, such as Petitioner, to conflicting regulatory schemes and infringes Canada's strong sovereign interest in regulating its own corporate citizens. Yet, it is well settled that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004).

Indeed, it is a well-established tenet of comity that where "one construction of a United States statute would bring it in conflict with the law of another state that has a clearly greater interest, . . or would subject a person to conflicting commands, . . . while another construction would avoid such a conflict, the latter construction is clearly preferred, if fairly possible." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. g (1987) (hereinafter "RESTATEMENT"). As this Court has explained,

> This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony-a harmony particularly needed in today's highly interdependent commercial world.

Empagran, 542 U.S. at 164-65.

Even if the application of CERCLA in this case was not "extraterritorial," there can be no question that its extension to Petitioner amounts to the application of a U.S.

regulation to a foreign entity domiciled and operating exclusively in a foreign jurisdiction. Yet, the Ninth Circuit did not even acknowledge, let alone analyze, the relevant factors for determining whether a state may reasonably prescribe laws with respect "to a person or activity having connections with another state," such as Petitioner in this case. *See* RESTATEMENT § 403(1). Those factors include the existence of justified expectations that might be protected or hurt by the regulation, the extent to which the regulation is consistent with the traditions of the international system, the extent to which another state may have an interest in regulating the activity and the likelihood of conflict with regulation by another state. *Id.* § 403(2).

In this case, where the Ninth Circuit expressly found that the statute was unclear and did not evince any congressional intent to extend it to foreign corporations, the court's disregard of these fundamental principles of comity was improper, for had it "take[n] account of the legitimate sovereign interests" of Canada, as it ought, it may well have reached a different result. *Empagran*, 542 U.S. at 164.

C. Principles of Comity Are Violated By the Ninth Circuit's Holding That CERCLA Could Be Applied To Foreign Companies Operating Solely Outside the United States.

The Ninth Circuit's decision offends comity for the additional reason that, as discussed in Petitioner's opening brief to the Ninth Circuit, CERCLA's provisions pertaining to "federally permitted releases" allow United States companies charged with violations of CERCLA to rely on United States environmental permits as exemptions to liability under CERCLA, but such permits and corresponding exemptions are not available to non-residents

such as Petitioner. Nor do Canadian environmental permits provide any basis for an exemption from CERCLA liability.

The application of CERCLA to Teck Cominco is thus inequitable and also inconsistent with the international law principle of national treatment. See EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 101 (1915) (Foreign governments' willingness to permit local courts in other states to exercise jurisdiction over their citizens is predicated, *inter alia*, upon "[t]he existence of regular courts and of laws assuring to the alien the administration of civilized justice, on terms of equality with nationals.").

This inequitable treatment of Canadian companies may be exacerbated by CERCLA's adoption of the principle of joint and several liability; United States entities contributing to pollution at a site may be able to assert a "federally permitted release" exemption not available to a non-resident, leaving the foreign entity to face sole or disproportionate liability despite others' contributions to the pollution. Such an application of CERCLA would also harm Canada's interests by discouraging Canadian businesses from engaging in economic activity where that activity is located close to the border, regardless of their compliance with Canadian environmental law. Given the industrial presence on both sides of the border, the Ninth Circuit's approach would represent a radical shift in the pattern of reasonable accommodation by each country for the other's industries operating in proximity to the border.

CONCLUSION

In this case, the Ninth Circuit construed an admittedly ambiguous statute that is "silent about *who* is covered by the Act" to apply to a Canadian corporation

based on the eventual coming to rest in the United States of by-products of that corporation's operations in Canada. In finding that, notwithstanding the statute's silence, CERCLA can be applied to and enforced against Petitioner in this case, the court ignored the established practice of Canada and the United States of resolving transboundary environmental disputes such as the one presented here through established diplomatic channels. The court also improperly eschewed any consideration of the principles of comity of nations and customary international law, including rules respecting non-interference with the internal affairs of another sovereign, and equitable principles of equal treatment of nationals and non-residents.

Although it may be appropriate in some circumstances to address transboundary pollution through litigation in the domestic courts of Canada or the United States, unilateral adjudication is neither necessary nor appropriate in this case. Indeed, although plaintiffs continue to press their private claims against Petitioner, EPA is no longer seeking enforcement of its UAO against Petitioner, having arrived at a settlement outside the context of CERCLA and this lawsuit. This settlement emphasizes that, in this case, allowing the underlying transborder issues to be fully resolved through diplomatic or treaty mechanisms – consistent with the past practice of Canada and the United States – would also preserve comity between the two countries and free both Canadian and U.S. companies with border operations from risks of liability under the unfamiliar, foreign laws of the neighboring country.

Accordingly, the Government of Canada respectfully submits that the Petition for a Writ of Certiorari should be granted and the decision of the Ninth Circuit should be reversed so that the issues can be resolved completely and finally between the two affected sovereigns, or, at least, be

resolved in a way consistent with international legal norms and considerations of comity.

Dated: Washington, D.C.
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In The
Supreme Court of the United States

TECK COMINCO METALS, LTD.,

Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, and STATE OF WASHINGTON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

Her Majesty the Queen in Right of the Province of British Columbia ("British Columbia") respectfully submits this brief in accordance with Supreme Court Rule 37.1.[1] British Columbia asks this Court to grant the petition filed by Teck Cominco Metals, Ltd. and review the decision below of the United States Court of Appeals for the Ninth Circuit.[2]

British Columbia is one of ten Canadian provinces. It has a population of more than four million, the third largest in Canada. British Columbia shares a 1,347-mile border with the United States – 561 miles adjacent to Washington, Idaho, and Montana, and 786 miles adjacent to Alaska. Every American state along the British Columbia-United States border lies within the Ninth Judicial Circuit, making British Columbia more affected than any other Canadian province by the Court of Appeals' decision in this case.

British Columbia, like all Canadian provinces, has significant exclusive and shared governmental powers under the Canadian Constitution. *See* Can. Const. art. VI,

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[1] The parties have consented to the filing of this brief. Letters indicating their consent have been filed with the Clerk of the Court. This brief was authored by Dorsey & Whitney LLP, counsel for British Columbia. Pursuant to Rule 37.6, British Columbia hereby affirms that no counsel for a party authored this brief in whole or in part, and that no persons or entities other than the province made any monetary contribution to the preparation or submission of this brief.

[2] The Court of Appeals' decision below, *Pakootas v. Teck Cominco Metals, Ltd.* (Ninth Circuit Case No. 05-35153), is reprinted in the appendix to the petition and is published at 452 F.3d 1066.

§ 92 (Constitution Act, 1867) (granting certain exclusive powers to the provincial legislatures). The Canadian federal system of allocating powers between the federal and provincial governments is comparable to, but not identical to, the American federal system. *Compare id.* art. VI, §§ 91 & 92 (allocating powers between federal and provincial governments) *with* U.S. Const. art. I, § 8 & amend. X (allocating powers between federal and state governments).

In Canada, environmental regulation, including regulation of discharges into the environment and remedial regulation governing cleanup of polluted sites, is largely a provincial responsibility. *See, e.g.*, *The Queen in Right of Alberta v. Friends of the Oldman River Soc'y*, [1992] 1 S.C.R. 3 (Can.) (explaining the federal-provincial division of environmental regulatory authority under Sections 91 and 92 of the Constitution Act, 1867); *Canadian Nat'l Ry. Co. v. Director Under the Envtl. Prot. Act*, [1991] 3 O.R.3d 609, ¶43 (Ont. Div. Ct.) ("Pollution is not a single matter assigned by the Constitution exclusively to one level of government. It is an aggregate of matters, which come within various classes of subjects, some within federal jurisdiction and others within provincial jurisdiction."). Although the American statute at issue in the Court of Appeals' decision, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, is a federal act, the comparable Canadian version of CERCLA is Part 4 of the British Columbia Environmental Management Act, S.B.C. 2003, Ch. 53 (Contaminated Site Remediation).[3] Thus, the

[3] For purposes of this brief, general references to "Canadian law" mean both federal and provincial law, whichever is applicable in a

(Continued on following page)

Court of Appeals' decision holding that an American federal statute could apply to conduct that occurred entirely in Canada specifically impacts British Columbia's jurisdiction to regulate environmental cleanup necessitated by pollution produced within the province, and the province of British Columbia has a significant interest in Teck's petition for certiorari.

In explaining that Canada's counterparts to CERCLA are provincial rather than federal, British Columbia does not mean to suggest that Part 4 of the Environmental Management Act would exclusively regulate the cleanup of the Columbia River site. Rather, as more fully discussed in the argument section of this brief, *see infra* § C, international law and principles of comity require that instances of cross-border pollution such as that in this case be addressed through bilateral agreements whenever possible. CERCLA governs cleanup of American pollution in the United States, and Part 4 of the Environmental Management Act governs cleanup of Canadian pollution in British Columbia, but applying one country's statutes to conduct in the other's territory violates sovereignty and harms comity.

British Columbia also has an interest in this case because Teck is headquartered in Vancouver and has many operations throughout the province. As a significant contributor to the provincial economy and the development of its resources, Teck and its facilities benefit the people of British Columbia. British Columbia, therefore, would like

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particular situation, and general references to "American law" mean both federal and state law, whichever is applicable in a particular situation.

to ensure that Teck is treated fairly in assessing cleanup costs for pollution at the Columbia River site. If Teck – or, for that matter, any other British Columbia business in a position to directly or indirectly cause pollution across the U.S.-Canada border – is to be held responsible for cleanup costs in the United States, it is only fair that those cleanup costs be assessed in a manner that recognizes and accounts for the cross-border, international nature of the environmental contamination. Unilaterally applying the laws of one country without any sort of bilateral agreement fails to recognize that cross-border pollution is an international issue, and British Columbia strongly opposes this unilateral approach taken by the Court of Appeals.

In essence, British Columbia's interest in the petition is based on (1) the provincial government's significant role in environmental regulation within its borders and (2) British Columbia's view that businesses operating within the province and contributing to its economy – like Teck – should not be subject to private lawsuits in the United States under exclusively American law for conduct that took place entirely in Canada. Accordingly, British Columbia is filing this brief to make the following case to this Court: Whatever CERCLA's statutory structure, environmental regulation of discharge and cleanup of pollutants that cross the U.S.-Canada border in either direction should be addressed, wherever possible, through bilateral negotiation and agreements between the two countries, not private lawsuits in one country's courts.[4]

[4] Formal international negotiations are primarily a matter for the Canadian and American federal governments; under the Canadian Constitution, British Columbia, like American states, does not have treaty powers. *See* Can. Const. (Constitution Act, 1867) art. IX, § 132;

(Continued on following page)

STATEMENT OF THE CASE

The facts most important to this brief, which British Columbia wishes to emphasize, are as follows:

- Discharges from the Trail Smelter into the Columbia River have been regulated under British Columbia and Canadian law from the outset of the smelter's operations in the early 1900s. The discharge of slag was authorized in accordance with provincial regulations until 1995, when updated assessments of environmental impacts resulted in a prohibition against any further discharge of slag into the river. The provincial regulations were also updated to require reductions in the discharge of metals to the river, which was accomplished through upgrades in smelter technology and pollution control equipment.

- The Trail Smelter is located in British Columbia, and discharges of effluent from the smelter were released into the Columbia River well inside British Columbia, approximately ten miles upstream from the U.S.-Canada border. Such pollutants entered the United States by traveling down the Columbia River.

U.S. Const. art. I, § 8. Because the federal government of Canada is equipped to represent the interests of the provinces in these bilateral negotiations, British Columbia has a strong interest in ensuring that the Canadian federal government is able to continue representing the provinces' interests in bilateral negotiations with the United States. Furthermore, although not formal international treaties, British Columbia also often works with neighboring states to reach agreements on environmental matters that are local in nature. *See infra* § C; *infra* note 7; App. 4-33.

- If Respondents successfully brought a private CERCLA action against Teck, liability for the Columbia River cleanup would be unilaterally assessed under American law with no regard to the possibility of reaching an agreement between Teck, Canadian federal and provincial governments, and American federal, state, and tribal governments.

- The Canadian federal government has attempted to initiate discussions with the United States regarding the Columbia River cleanup, noting that while "Canada is opposed to enforcement of CERCLA against Teck . . . , a Canadian company operating in Canada," Teck "has offered to pay the costs of an investigation and remediation of the health and environmental risks attributable to its operations, but only under the terms of an international instrument and a binding commitment with the Canadian government." Letter from the Canadian Department of Foreign Affairs and International Trade to the U.S. Department of State, dated Nov. 23, 2004 (App. 1-3) (presented to the Court of Appeals in the Appendix to the Government of Canada's Amicus Curiae Brief).

ARGUMENT

The Court of Appeals disregarded the international and intergovernmental complexities inherent in transboundary pollution cases by unilaterally and exclusively applying American law to Teck, a Canadian company operating a smelter in British Columbia. The Court of Appeals' decision to apply American law without regard to

the fact that Teck's discharges occurred in British Columbia conflicts with long-established principles of international comity. Cross-border environmental issues should be addressed through bilateral negotiations and agreements, not unilateral application of one country's laws to conduct occurring in the other country's territory. This Court should grant Teck's petition in order to reestablish the importance of international comity in resolving cross-border disputes.

A. The United States and Canada, at both the federal and state/provincial levels, have different environmental regulatory schemes, but they share the same ultimate goals of protecting the environment while promoting economic development.

Canada and the United States are both industrialized, resource-rich countries, and they both have federal systems of government with constitutional divisions of power between the federal and state/provincial governments. Like the American federal and state governments, the Canadian federal and provincial governments all share the common goal of balancing environmental protection and resource preservation with economic growth and respect for private property rights. This is not an easy balance to manage, but it is important that any government seeking the best interests of its people make its best effort to manage this balance fairly and effectively.

The American federal and state governments employ various laws in their attempts to manage this difficult balance. One of these laws is CERCLA, which provides for, among other things, a private right of action against parties potentially liable for cleanup of polluted sites.

British Columbia does not quarrel with the United States' decision to enact CERCLA and create private litigation regarding environmental cleanup, so long as that litigation stays within the United States. Part 4 of the Environmental Management Act, like CERCLA, provides means to ensure cleanup of polluted sites within British Columbia, but, unlike CERCLA, it is enforced exclusively by the provincial government, not private litigation.

It is immaterial whether CERCLA or the Environmental Management Act represents the more effective framework for ensuring cleanup of polluted sites. All that matters is that the United States and Canada have chosen different ways of approaching this difficult and important issue – the United States enacted CERCLA, and Canada has left the matter largely to the provinces, leading to Part 4 of British Columbia's Environmental Management Act. Allowing Canada and the United States to manage their own environmental affairs is, of course, perfectly fair as long as the pollution remains in the jurisdiction whence it came. The problem, as in this case, arises when the pollution crosses an international border. The Court of Appeals chose to fall back on a technical reading of the CERCLA statute, willfully ignoring the implications of its unilateral cross-border application of American environmental law. This was error.

B. The Court of Appeals mistakenly treated Respondents' suit as "domestic" by narrowly focusing on the fact that the pollution currently lies on the American side of the border and neglecting to read CERCLA as part of a broader "constellation" of environmental regulation.

The Court of Appeals stated that its decision to reach across the U.S.-Canada border to apply CERCLA to a

Canadian company acting exclusively in British Columbia "is reinforced by considering CERCLA's place within the constellation of [American] environmental laws, and contrasting it with" the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*" Pet. App. at 21a (citing *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996)). The court continued, noting that "RCRA regulates the generation and disposal of hazardous waste, whereas CERCLA imposes liability to clean up a site when there are actual or threatened releases of hazardous substances into the environment." *Id.* at 21a-22a. In stating its view that extraterritorially applying CERCLA to acts within Canada was not, technically speaking, extraterritorial, the court observed that "it is the Canadian equivalent of RCRA, not CERCLA, that regulates how Teck disposes of its waste within Canada." *Id.* at 22a.

In effect, the Court of Appeals reasoned as follows:

- Remedial environmental cleanup laws, like CERCLA, exist in a separate universe from regulatory environmental discharge laws, like RCRA.
- Here, the discharge occurred in Canada, so it was governed by the Canadian or British Columbia equivalent of RCRA, but the cleanup must occur in the United States, so it is governed by CERCLA.
- Therefore, even though the discharge occurred north of the border, the fact that the cleanup area is entirely in the United States means that American law governs exclusively.

This reasoning might be *internally* logical, but it ignores the broader context of the environmental regulation field. In ignoring this broader context, the Court of Appeals mistakenly treats each individual environmental law – American or Canadian – as separate and distinct. But environmental laws should not be viewed this way, because they are designed to work together as part of a broader system of regulation. Indeed, the court itself referred to "CERCLA's place *within the constellation of . . . environmental laws*," Pet. App. at 21a (emphasis added), recognizing that CERCLA is merely one part of a broader federal and state regulatory scheme.

Viewed through the narrow, out-of-context prism of the Court of Appeals' reasoning, it is a simple matter to say: "This is a cleanup case, the cleanup area is in the United States, so it involves a domestic application of American law." And cleanup does in fact involve an application of domestic American law when the discharge is also governed by domestic American law. If, for example, the Trail Smelter were located just on the American side of the border, CERCLA could be applied as an integral part of "the constellation of environmental laws" applicable to the stretch of the Columbia River just south of the U.S.-Canada border (in this case, that "constellation" consists of a combination of U.S. federal and Washington state law). For a slightly more complicated, but still domestic, example, imagine that the Trail Smelter was along the Columbia River in southern Washington, and the cleanup site was on the Oregon side of the river. Federal law, including CERCLA, would apply in both states, but there could be a question of conflicting Washington and Oregon environmental law if Washington claimed the discharge was licensed, permitted, and legal, with Oregon insisting that

it was not. Even then, U.S. federal courts could conduct a conflict of laws analysis, determine which law would apply, and fairly decide the matter under established national rules.[5]

The important point here is that, when Congress enacted CERCLA – and when U.S. federal regulatory agencies and courts enforce CERCLA – Congress "consider[ed] CERCLA's place within the constellation of [American] environmental laws." Congress did *not* "consider[] CERCLA's place within the constellation of" American *and Canadian* environmental laws, which must be done in order to fairly and properly address cross-border pollution issues. The Court of Appeals failed to recognize this distinction when it decided to "domestically" apply one specific American statute to the cleanup of pollution discharged in British Columbia and regulated by Canadian federal and provincial law. Given its cross-border migration, the discharges from the Trail Smelter ought to be regulated by "the constellation of" American *and Canadian* environmental laws, and CERCLA should not have been applied exclusively and unilaterally to the Columbia River cleanup.

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[5] The same would be true if this were a dispute between two Canadian provinces regarding the applicability of one province's environmental law to a cleanup in or discharge from another province – the Supreme Court of Canada has the authority to resolve such conflict of laws matters. *See, e.g., Interprovincial Co-Operatives Ltd. v. The Queen in Right of Manitoba*, [1976] 1 S.C.R. 477 (Can.).

C. Considering principles of international comity, fairly and properly addressing cross-border pollution issues requires bilateral negotiation and agreements, not unilateral judicial action by one country's courts under one country's law.

The fundamental question presented by this case is not whether an American or Canadian facility near the border that causes pollution on the other side of the border may be required to assist with the cleanup of the polluted site; it is how to allocate responsibility and assess liability for cleanup costs.[6] Here, where a Canadian smelter polluted an American river, this Court must determine whether it is a matter properly resolved (1) in American courts under exclusively American law, which was the approach approved by the Court of Appeals, or (2) pursuant to bilateral negotiation and agreement, and possible reference to the International Joint Commission ("IJC"), which is the approach historically taken to cross-border pollution issues by Canada and the United States. The Court of Appeals effectively dismissed the significance of the U.S.-Canada border and applied American law. British Columbia asks this Court to instead favor bilateral solutions respecting the laws of both countries.

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[6] British Columbia does not dispute that, to the extent Teck is responsible for polluting the Columbia River, it may be required to contribute to the cleanup costs. *See* Boundary Waters Treaty, cited *infra*, art. IV ("It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."); *Restatement (Third) of Foreign Relations Law* § 601(1)(b) ("A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control . . . are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.").

As explained in the petition, Canada and the United States share a long history of working together to cooperatively resolve border issues, including cross-border pollution. *See* Pet. at 10-12. British Columbia also has a strong record of working with neighboring American states to address and resolve environmental issues. *See, e.g.*, Environmental Cooperation Agreement Between the Province of British Columbia and the State of Washington (May 7, 1992) (App. 4-9); Memorandum of Understanding Between the Washington Department of Ecology & the British Columbia Ministry of Environment, Land, & Parks (April 12, 1996) (App. 10-15); Interagency Memorandum of Understanding Between the State of Washington, Department of Ecology and the Province of British Columbia, Ministry of Environment, Land and Parks (applying the 1992 Environmental Cooperation Agreement to the Columbia River) (App. 16-22); Memorandum of Understanding Between the Washington State Department of Ecology and the British Columbia Environmental Assessment Office (June 20, 2001) (App. 23-29); Environmental Cooperation Arrangement Between the Province of British Columbia and the State of Idaho (September 14, 2003) (App. 30-31); Environmental Cooperation Arrangement Between the Province of British Columbia and the State of Montana (September 14, 2003) (App. 32-33); Memorandum of Understanding Between the Idaho Department of Environmental Quality and the British Columbia Ministry of Water, Land and Air Protection (App. 34-37).[7] Resolving

[7] Since neither Canadian provinces nor American states have the power to enter into treaties, *see supra* note 4, these types of state-provincial accords are limited to "agreements" and "memorandums of understanding" that do not have the full force to international treaties. That said, these state-provincial environmental agreements and

(Continued on following page)

these issues through bilateral negotiation and agreement is important because it is the only method that ensures the resolution considers both American and Canadian environmental law and practice. While each country can and should apply its own law when regulating discharge and cleanup of domestic pollution, cross-border pollution must be addressed taking into account both countries' regulatory systems.

Since the United States and Canada share a history of bilateral solutions, there is no need to start from scratch in fashioning an agreement for cleanup of the Columbia River site. The 1909 Boundary Waters Treaty between the United States and Great Britain (on behalf of Canada), which established the IJC to address border disagreements, should govern. *See* Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448 ("Boundary Waters Treaty"). If the United States and Canada are unable to resolve the dispute through bilateral negotiation, either country may, under the treaty, refer "matters of difference . . . involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the [U.S.-Canada border] . . . to the International Joint Commission ["IJC"] for examination and report. . . ." Boundary Waters Treaty, art. IX. If the two countries are unable to reach an agreement based on the IJC's Article IX report, the countries may agree to have the IJC issue a binding decision. *See id.* art. X. As such, this treaty "specifically

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memorandums reflect British Columbia's ability and desire to discuss and enter into agreements with its neighboring states to address cross-border environmental issues.

provides a remedy for resolving these types of transboundary water pollution disagreements." Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. Rev. 363, 414 (2005); *see also id.* at 415-20 (discussing the application of the Boundary Waters Treaty to cross-border pollution issues).[8] Indeed, the United States and Canada have even used the Boundary Waters Treaty to resolve a dispute regarding air pollution from the very same facility at issue here, the Trail Smelter, that began during the 1920s and was finally resolved by a special arbitration tribunal in 1941. *See id.* at 420-23.[9]

It is remarkable that the Court of Appeals decided to apply exclusively American law to this cross-border pollution case without even citing the Boundary Waters Treaty, especially given that the Boundary Waters Treaty, like all treaties, is part of "the supreme law of the land" in the United States. U.S. Const. art. VI, cl. 2. And constitutionally-binding treaties aside, this Court has historically held

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[8] Professor Parrish also notes that "Canada has long been concerned that Teck Cominco's Trail Smelter operations were violating Canada's obligations under the Boundary Waters Treaty." Parrish, *supra*, at 414 n.264. As stated, British Columbia does not seek to absolve Teck of all responsibility for pollution at the Columbia River site; rather, the province seeks to ensure that, if Teck is to be assessed liability for cleanup costs, it be done by bilateral agreement or application of treaty law, not unilateral, cross-border application of American law.

[9] The final decision in the "Trail Smelter Arbitration" has been called "by far the 'most influential decision on transboundary pollution in international law.'" Parrish, *supra*, at 420 (quoting Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 Duke L.J. 931, 947 (1997)).

that principles of international comity and respect for the law of nations are presumptively binding on all laws passed by Congress. *See, e.g.*, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . .") (op. per Marshall, C.J.), *quoted by McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963), and *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 178 n.35 (1993).

In *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), this Court discussed and further developed these principles in declining to apply the Labor Management Relations Act to foreign seamen on a foreign ship while in an American port. This Court stated that the judiciary is ill-suited to wade into international affairs where not clearly directed to do so:

> For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and relative action so certain.

Id. at 147. That same reasoning should apply to this case. Congress enacted CERCLA as part of what the Court of Appeals called the United States' "constellation of environmental laws," Pet. App. at 21a, and it functions perfectly well within that constellation. But whatever the Court of Appeals' technical reading of terms like "arrangers" and "releases," there is no evidence that Congress intended CERCLA to reach across the U.S.-Canada border and undermine the bilateral approach to cross-border

pollution historically followed by Canada and the United States.

The Court of Appeals' decision recklessly ran "interference in . . . a delicate field of international relations" without "the affirmative intention of the Congress clearly expressed." Without any evidence of clear Congressional intent, the Court of Appeals should have respected principles of international comity and allowed the United States and Canada to address the cross-border Columbia River cleanup issue bilaterally.

D. Application of CERCLA to conduct within British Columbia interferes with the province's environmental regulation scheme and would be unfair.

The application of American law by U.S. courts to discharges from the Trail Smelter into the Columbia River would not be an isolated instance, limited to that specific facility and that specific activity. There is nothing in the Court of Appeals' opinion that would preclude the application of American law to thousands of other entities whose activities take place entirely within British Columbia and are subject to provincial regulation.

The interference of the Court of Appeals' decision with British Columbia's environmental regulation scheme can be illustrated by considering one of the differences between Part 4 of British Columbia's Environmental Management Act and CERCLA. CERCLA, like many U.S. environmental statutes, contains a parallel enforcement mechanism whereby "private attorneys general" can file citizens suits such as the instant case so as to enforce regulations, permits, and orders. *See* 42 U.S.C. § 9659(a).

To incentivize such private enforcement, prevailing plaintiffs are entitled to an award of attorneys' fees and costs. *See id.* § 9659(f). At the same time, such private actions are somewhat constrained by the requirements that they must provide 60-day advance notice of the suit to the federal and affected state governments, *see id.* § 9659(d)(1), no action may be commenced if the United States is already "diligently prosecuting" an enforcement action, *see id.* § 9659(d)(2), and the United States and the affected state may intervene in any action as of right, *see id.* § 9659(g).

British Columbia's Environmental Management Act has no similar provision. Rather, it has long been the province's statutory and administrative policy to use formal enforcement actions as a last resort, preferring to devote the resources that would be consumed in litigation to voluntary cleanup agreements and other remedial mechanisms. For that reason, a citizen suit provision is antithetical to the province's environmental policy, because it substitutes time-intensive and costly formal litigation for other enforcement mechanisms that, in the province's considered judgment, are more cost effective. Under the Court of Appeals' decision, individual U.S. citizens would have private attorney general rights against Canadian entities operating in British Columbia, rights Canadian citizens who may be equally affected by the same pollution would not have.

Moreover, since neither British Columbia nor the federal government of Canada enjoy any of the notice, diligent prosecution, or intervention rights afforded their American regulatory counterparts under CERCLA, the delicate balance envisioned in CERCLA between private attorneys general and overseeing agencies would be upset.

A Canadian province that has consciously chosen to take a different regulatory path than the United States would be subject to a more extreme exposure to private oversight, with its attendant contentiousness and attorneys-fees disputes, than U.S. jurisdictions would be subject to. This is an affront to longstanding principles of comity and bilateral resolution of transboundary issues.

As another example of the consequences of the Court of Appeals' decision, under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, the difficult problem of cross-border air pollution is expressly recognized and managed through a program of respect and reciprocity at the highest levels of government, *see id.* § 7415, a program that has served both countries well. Yet, because a CERCLA "facility" can be created through deposits of pollutants carried by wind as easily as by water, the Court of Appeals' decision would authorize private U.S. citizens to effectively second-guess in U.S. courts the range of measures taken pursuant to the Clean Air Act, a result clearly not envisioned by Congress in enacting either the Clean Air Act or CERCLA.

The potential impact of the Court of Appeals' decision within Canada, and on international law, has already been recognized by commentators:

> In *Pakootas v. Teck*, the Court of Appeals for the Ninth Circuit issued a stark decision that provides for the extra-territorial application of U.S. domestic law, and raises far more questions than it answers. If the decision stands, it will have a fundamental impact on the development of international environmental law. . . . Further, the decision interferes in the operation of Canadian law and creates uncertainty in its application to Canadian facilities.

John C. Turchin & Risa Schwartz, *Beyond Trail Smelter: Assessing the Changes in International Environmental Law, in Environmental Law: The Year in Review 2006* 105, 106 & 124 (Stanley D. Berger & Dianne Saxe eds., 2007).

The Court of Appeals' decision, if it stands, will have broad impact on environmental regulation within British Columbia and on the relationship between the Canadian and American federal and provincial/state governments addressing cross-border environmental issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2, 2007

Department of Foreign Affairs and International Trade

Ministère des Affaires éntrangères et du Commerce International

125 Sussex Drive
Ottawa, Ontario
KIA 0G2

November 23, 2004

NUE-0118

Mr. Terry A. Breese
Director,
Office of Canadian Affairs
United States Department of State

Dear ~~Mr. Breese~~: Terry

Thank you for your letter of September 14, 2004, regarding contamination in Lake Roosevelt in the upper Columbia River in Washington State. We appreciate the willingness of the United States to solve this matter through a bilateral agreement and we are committed to its development, to resolve the contamination in the region, in order to protect human health and the environment.

As you will recall from our meeting on February 28, 2004, Canada was to develop a proposal as an alternative to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). In March, we sent to you the proposed MOU "Respecting the Investigation of Contamination in the Upper Columbia River/Lake Roosevelt Area". Our proposal was designed to investigate conditions in Lake Roosevelt, to assess the risks to the

environment and human health, as a priority, and to a develop a remediation plan.

This joint approach was intended to provide science-based outcomes, public participation, access to information and timely decisions. We appreciate your obligations to Native Americans and the interests of the State of Washington, as mentioned in your letter and expect that they would have an enhanced consultative role in the development and implementation of the proposed MOU.

As noted in our January 8, 2004 diplomatic note, Canada is opposed to enforcement of CERCLA against Teck Cominco Metals Ltd., a Canadian company operating in Canada. The company has offered to pay the costs of an investigation and remediation of the health and environmental risks attributable to its operations, but only under the terms of an international instrument and a binding commitment with the Canadian government.

We appreciate the offer in your letter to consult with Canada and share information on EPA's on-going RI/FS investigation. However, Canadian officials are not prepared to be subject to CERCLA, the US statute. Under our proposed MOU, decisions on the investigation into conditions in Lake Roosevelt and remediation would be made jointly by US and Canadian experts, on the basis of consensus and outside of the ambit of CERCLA. In transmitting our proposed MOU, we also indicated an interest in referring the matter to the International Joint Commission, for an independent, scientific assessment and we continue to be interested in this possible option.

We remain concerned that this unilateral decision by EPA to proceed under CERCLA may lead to other environmental liability cases being launched in both countries.

I look forward to the opportunity to discuss a mutually acceptable agreement, in the long tradition of the two governments working cooperatively to solve transboundary environmental issues. Thank you for your attention to this important issue and we would be pleased to meet to discuss its resolution at your convenience.

Sincerely,

/s/ Bruce Levy
Bruce Levy
Director,
United States Relations Division

Environmental Cooperation Agreement
Between the Province of British Columbia
and The State of Washington

WHEREAS the Province of British Columbia and the State of Washington are committed to ensuring a consistent and high-level of environmental quality for their citizens; and

WHEREAS environmental concerns and impacts respect neither physical or political boundaries, and both governments recognize the necessity for joint action on issues of mutual interest; and

WHEREAS the Ministries of the Province and the Executive Departments of Washington wish to share information and to cooperate on environmental matters, are prepared to work together with respect to their responsibilities, and wish to enter into specific cooperation arrangements; and

WHEREAS the increased complexity of environmental issues, particularly their interjurisdictional impacts, requires coordinated responses from both governments;

NOW, THEREFORE, the Province of British Columbia and the State of Washington agree to establish a **British Columbia/Washington Environmental Initiative** to promote and coordinate mutual efforts to ensure the protection, preservation and enhancement of our shared environment for the benefit of current and future generations;

The parties also agree to develop an action plan, which shall form part of these efforts, reflecting mutual priorities and to enter into specific arrangements necessary to address environmental problems.

DATED AT Olympia Washington,
United States of America
This 7th day of May, AD 1992.

/s/ Mike Harcourt
Mike Harcourt, Premier
Province of
British Columbia

/s/ Booth Gardner
Booth Gardner, Governor
State of Washington

BRITISH COLUMBIA/WASHINGTON ENVIRONMENTAL INITIATIVE

Terms of Reference

Mandate/Purpose:

The Initiative's mandate is derived from the Environmental Cooperation Agreement between the two jurisdictions entered into in May 1992. The Initiative's purpose is to ensure coordinated action and information-sharing on environmental matters of mutual concern.

Members: Deputy Minister, BC Environment, Lands and Parks

Director, Washington Department of Ecology

Observers: Regional Director General, Pacific and Yukon Region, Environment Canada

Administrator, Region 10, US Environmental Protection Agency

Support:

Administrative support will be provided by BC Environment, Lands and Parks and the Washington Department of Ecology who will be jointly responsible to prepare agendas, ensure appropriate attendance at Initiative meetings and coordinate follow-up action.

Procedures:

- The Initiative will generally meet twice each year, or as necessary.
- The Initiative may establish sub-committees to deal with specific matters.
- The Initiative may, by formal agreement, establish Task Forces to address issues of special or major significance.
- An Annual Report will be made to the Premier of British Columbia and the Governor of Washington.

BRITISH COLUMBIA/WASHINGTON ENVIRONMENTAL INITIATIVE

Preliminary Action Plan/Work Priorities

British Columbia and Washington's commitment to cooperative efforts on environmental matters has resulted in the identification of the following priority issues for action:

1. Georgia Basin/Puget Sound Water Quality Initiative

   Georgia Basin/Puget Sound water quality is considered to be a **high priority issue** and requires immediate joint attention.

   Concerted efforts are underway by both governments to identify and remedy pollution problems in the Georgia Basin and Puget Sound. Coordination of these programs will enhance their environmental benefits.

2. Columbia River/Lake Roosevelt Water Quality

Columbia River/Lake Roosevelt Water Quality is considered to be a **high priority issue** by both parties and requires immediate joint attention.

A task force involving affected interest groups will examine the issues and ensure necessary action is taken to control sources and protect water quality.

3. Nooksack River Flooding

Nooksack River flooding is considered to be a **high priority issue** and requires continued joint attention.

Recent flooding in Washington's Nooksack River resulted in flooding in British Columbia's West Sumas area. Continued attention is needed to ensure implementation of the recommendations of a Task Force that identified actions needed to avert recurrence of such problems.

4. Regional Air Quality Management

Regional air quality management is considered to be a **high priority issue** in the Georgia Basin/Puget Sound airshed and requires timely joint attention.

Issues such as transboundary flows of sulphur dioxide, nitrogen oxides and volatile organic compounds should be addressed in an integrated manner through regional implementation of the Canada/U.S. Air Quality Agreement.

5. Coordinated Groundwater Management (Sumas-Abbotsford)

Management of the groundwater in the Sumas-Abbotsford area is considered to be a **high priority issue** and requires immediate joint attention.

The aquifers are of particular concern as a result of domestic use on both sides of the border. Improved co-ordination of the activities of all parties to address both groundwater quantity and quality will encourage more effective resolution.

6. Solid, Hazardous and Biomedical Waste Cooperation

Waste management is considered to be an **emerging issue** and should be the subject of information exchange and further discussion. The transboundary impacts of waste management practices and contaminated sites should be examined through mechanisms such as the Memorandum of Understanding on Hazardous Waste Management.

7. Water Resource Management

Water management in general is considered to be an **emerging issue** and should be the subject of information exchange and further discussion.

Increased water use in response to growing needs necessitates protection of instream flows; this requires sound data and thorough field investigations. Joint efforts can ensure efficiency and maximum productivity for both governments.

8. Wetlands Protection

The protection of wetlands and wildlife habitat is considered to be an **issue of ongoing interest** to both parties. The exchange of information on wetland and habitat protection programs will form the basis for initial cooperation on this issue.

9. Other Issues

The parties agree to use the Initiative to identify and address issues of concern, and will assist each other in dealing with the agencies and departments of their

respective governments. Potential issues for discussion include: earthquake and emergency preparedness and State of Environment reporting.

Province of British Columbia

The State of Washington

British Columbia/Washington Environmental Cooperation Council

May 3, 1996

TO: Premier Glen Clark
Governor Mike Lowry

FROM: Thomas Gunton, Deputy Minister, Ministry of Environment, Lands and Parks
Mary Riveland, Director, Department of Ecology

SUBJ: Memorandum of Understanding on Environmental Cooperation

In accordance with the 1992 Environmental Cooperation Agreement between the state and the province, our agencies have been working together for the past 4 years to resolve and avoid cross-border problems. We have recognized that environmental needs do not respect political borders and that effective protection of our resources and residents requires shared programs and regular communication.

We have developed effective joint efforts to address Puget Sound and Georgia Basin water quality, to reduce pollution and respond to spills in the Columbia River, to regulate air pollution sources in the border region, to reduce flooding problems in the Nooksack River and to protect the ground water in the Abbotsford/Sumas area.

To promote continuation of these activities and to maximize our efficiency and effectiveness, we have completed

a formal Memorandum of Understanding between our agencies. We see this document as a framework that will aid in the implementation of the 1992 Environmental Cooperation Agreement and serve as a link among subject-specific agreements. Such agreements have already been developed on air quality management and protection of the Columbia River; these will become appendices to this Master MOU.

We are forwarding a copy of the Memorandum of Understanding because we hope you will share our sense of accomplishment in building a transboundary partnership that increases each jurisdiction's capacities and constructively avoids or resolves common problems. A copy of this message and the Memorandum of Understanding are being sent to the Honourable Moe Sihota, Minister of Environment, Lands and Parks, for his information.

Enclosure

cc Honourable Moe Sihota

MEMORANDUM OF UNDERSTANDING BETWEEN THE WASHINGTON DEPARTMENT OF ECOLOGY AND THE B.C. MINISTRY OF ENVIRONMENT, LANDS & PARKS

I. Purpose and Scope

In 1992, the Governor of Washington and Premier of British Columbia signed an Environmental Cooperation Agreement committing the two jurisdictions to "promote and coordinate mutual efforts to ensure the protection, preservation and enhancement of our shared environment for the benefit of current and future generations." The

Agreement went on to authorize the state and province to "enter into specific arrangements necessary to address environmental problems." It designated the Washington Department of Ecology (hereafter Ecology) and the British Columbia Ministry of Environment, Lands and Parks (hereafter the Ministry) as the agencies responsible for implementation. For purposes of this Memorandum of Understanding (MOU), those agencies shall be deemed the Lead Agencies.

The Ministry and Ecology have established Task Forces and created other mechanisms for joint efforts. This MOU describes approaches to addressing transboundary environmental issues that can be used by any of the Task Forces or by the Lead Agencies when no task force exists.

This "Umbrella" MOU is designed to be general, with the recognition that subject-specific Memoranda can be adopted as Appendices if the Lead Agencies jointly agree to do so.

II. Responsibilities

The Department of Ecology is Washington's main environmental protection agency, with lead responsibility for air and water pollution control, hazardous waste management, coastal and shoreline protection, water resources allocation, toxic site cleanup, and technical and financial assistance to local governments for environmental protection. The Department's mission is to protect, preserve, and enhance Washington's environment and promote the wise management of our air, land and water for the benefit of current and future generations.

The mandate of the British Columbia Ministry of Environment, Lands and Parks is to protect the clean air, fresh water and productive land in the province, and to nurture the abundance of natural areas, wildlife and scenic beauty. To that end, the Ministry is responsible for controlling or managing toxic, solid and liquid wastes, establishing and operating a network of protected areas, managing the use and disposition of publicly owned lands, and managing freshwater fisheries and wildlife.

III. Provisions

The Ministry and Ecology wish to maximize efficiency and effectiveness and to cooperate in a spirit of partnership. Toward this end, they agree to make every effort to share information, consult with one another, and coordinate their work on environmental issues that affect resources and residents in the border region.

In particular, the agencies commit to:

- designate lead liaisons for cross-border communications to serve as central points of contact on issues related to the Environmental Cooperation Agreement on this MOU;
- upon request by the other jurisdiction, establish communications among staff members working on issues with cross-border impacts to enable open sharing of information and awareness of processes for public review and comment;
- provide referrals to other agencies within the state and province when an issue needing resolution does not fall within the responsibilities of the lead agency; and

- establish working relationships with regional representatives of federal agencies to facilitate cooperation on appropriate issues.

In accordance with implementing appendices developed by the Lead Agencies, the state and province will:

- exchange draft permits on proposed major projects that could have cross-border impacts;
- include the regional office of the other jurisdiction in the distribution of environmental assessments for major projects within x kilometers (y miles) of the border;
- develop early notification procedures to identify problems or sources of controversy to residents or government agencies in the border region;
- establish procedures to cooperatively respond to emergencies that could cause environmental harm or damages; and
- cooperate in the development of environmental information, including education, training and technical support.

Implementing appendices may include other parties if the Lead Agencies determine that this will be beneficial.

IV. Dispute Resolution

In the spirit of partnership and the efficient use of public resources, the parties agree to attempt to resolve disputes or conflicts at the lowest possible staff level. Issues will be elevated to more senior management levels within each agency as needed to achieve resolution. The mutual goal shall be to ensure the rapid resolution of disagreements

before negative impacts on the environment or economy occur.

V. Terms of this Memorandum of Understanding

This agreement shall be effective when signed by both parties. It may be amended at any time by agreement between the parties and may be terminated by either party upon 30 days written notice to the other.

IN WITNESS OF THE AGREEMENT TO ADHERE TO THE TERMS OF THIS MEMORANDUM OF UNDERSTANDING, the parties have executed it by their signatures:

/s/ Tom Gunton	/s/ Mary Riveland
Tom Gunton Deputy Minister, B.C. Ministry of Environment, Lands and Parks	Mary Riveland Director, Washington Department of Ecology
96/4/12 Date	4/10/96 Date

INTERAGENCY MEMORANDUM OF UNDERSTANDING BETWEEN THE STATE OF WASHINGTON DEPARTMENT OF ECOLOGY EASTERN REGIONAL OFFICE

AND

THE PROVINCE OF BRITISH COLUMBIA MINISTRY OF ENVIRONMENT, LANDS AND PARKS KOOTENAY REGION

This two party agreement is made and entered into by and among the Department of Ecology, hereinafter referred to as "Ecology" and the Ministry of Environment, Lands and Parks, hereinafter referred to as "BC Environment."

Whereas, the Environmental Cooperation Agreement of May 7, 1992 between the Province of British Columbia and the State of Washington, mandated coordinated action and information sharing between the State and the Province on environmental matters of mutual concern and the establishment of Task Forces to address issues of major environmental significance.

Whereas, environmental pollutants in the international boundary portion of the Columbia River drainage can travel across the border and may be a source of concern to the parties to this MOU and area residents,

Whereas, Ecology and B.C. Environment are parties to a formal Memorandum of Understanding regarding information sharing on air emission sources (April 14, 1994).

Whereas, the Lake Roosevelt Water Quality Council which provided a forum for Ecology and B.C. Environment to cooperate on water quality issues related to Lake Roosevelt

and the Upper [Lower] Columbia River ceased operation in September, 1995 as a planning and coordinating body.

Whereas, at the June 9, 1995 meeting of the British Columbia/Washington Environmental Cooperation Council, B. C. Environment and Ecology managers were directed to prepare a Memorandum of Understanding to assure continued coordination and cooperation relative to major environmental issues within the international portion of the Columbia River drainage.

Whereas, the regulatory/oversight responsibilities over waste discharges rests primarily with Ecology and B.C. Environment as the regulatory agencies of the State and the Province.

Therefore, B. C. Environment and Ecology hereby enter into this Memorandum of Understanding, hereafter called the MOU.

This MOU incorporates by reference the four party MOU on Air Quality between the State of Washington Department of Ecology, The State of Washington Northwest Air Pollution Authority, The Province of British Columbia Ministry of Environment, Lands and Parks, and The Greater Vancouver Regional District, as it applies to this portion of the Columbia River drainage.

B. C. ENVIRONMENT AND ECOLOGY, MUTUALLY AGREE TO:

- in accordance with section III a) of attachment 1, provide timely prior notification of proposed discharges to the water or land which have significant potential for cross boundary water quality impacts.

- in accordance with section III b) of attachment 1, provide timely prior notification of proposed significant consumptive water use.
- in accordance with section III c) of attachment 1, provide an opportunity for comment on planning activities that may have trans-boundary impacts.
- in accordance with section III d) of attachment 1, provide timely notification of significant spills to the Columbia River including tributary streams.
- in accordance with section III e) of attachment 1, share air and water quality monitoring data.
- in accordance with section III f) of attachment 1, provide the opportunity for trans-boundary public comment on proposals under consideration by the agency with jurisdiction.
- in accordance with section III f) of attachment 1, jointly facilitate public information sharing meeting upon mutual agreement of need.
- specify appropriate contacts within each agency to facilitate timely sharing of information.

Statutory Powers

Nothing in this Memorandum of Understanding shall be construed as affecting or limiting the legislative or statutory powers of the signatories to this memorandum.

Termination

The period of performance of this MOU shall commence on the date it is signed by both parties and remains in effect until terminated by either or both of the parties by way of 30 days prior written notification.

IN WITNESS THEREOF, the parties execute this agreement.

Province of British Columbia Ministry of Environment, Lands, and Parks	State of Washington Department of Ecology
/s/ Dennis G. McDonald	/s/ Claude W. Sappington
Dennis G. McDonald Regional Director Kootenay Region	Claude W. Sappington Regional Director Eastern Region

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ATTACHMENT 1

SCOPE OF WORK

PRIOR CONSULTATION AND INFORMATION SHARING

ON

ENVIRONMENTAL ISSUES

I. Coordination and Cooperation

Air and water quality are issues of mutual concern to both parties in this agreement. Because point and nonpoint sources of contamination on one side of the international boundary have the potential to impact environmental quality on the other side, it is imperative that regulatory agencies in both Washington and British Columbia coordinate their regulatory actions and cooperate in sharing relevant environmental quality information necessary to ensure environmental protection as provided by both jurisdictions. To this end, this MOU is entered into by the agencies on both sides of the border with the most direct regulatory impact on cross-boundary environmental quality issues. These are the British Columbia Ministry of Environment, Lands and Parks and Washington

State Department of Ecology. This MOU addresses the roles and responsibilities of these agencies in consulting with each other early in the application process concerning significant environmental permits, licenses, monitoring and planning activities.

II. Geographic Area of the Scope of Work

The area of work encompasses the international portion of the Columbia River drainage defined as the main stem Columbia River between Grand Coulee Dam and Hugh Keenleyside Dam and the Pend Oreille River within Washington State and British Columbia.

III. Elements of Prior Consultation and Information Sharing

There shall be prior consultation and information sharing concerning environmental activities between B. C. Environment, Kootenay Regional Office (Nelson) and Ecology, Eastern Regional Office (Spokane) as follows:

a) Wastewater Discharges/permits – At least thirty (30) days prior to the issuance, re-issuance of a permit, or significant modification (significant being defined in accordance with normal business practices followed by the regulating agency) of an existing waste discharge permit that may affect the international portion of the Columbia River drainage, the parties will submit a complete application package to each other for review and comment. The permitting agency shall provide a copy of the final permit and upon request, the Responsiveness Summary (technical report) of the reviewing agency. Discharges of effluent to ground that may adversely affect the

cross boundary surface or ground water quality shall also be included in the review and consultation process.

b) Consumptive Use of Water – at least thirty (30) days prior to the issuance of significant (in excess of 10 cfs) permanent consumptive water rights that could effect [sic] cross border stream flow, the permitting agency shall provide application information to the reviewing agency for comment. The final decision will be copied to the reviewing agency.

c) Water Drainage Basin Planning – From time to time, water drainage basin planning activities may be contemplated for a basin located within the geographic area of this MOU. If in the opinion of the planning agency there will be cross-boundary impacts, the jurisdiction affected by the planning activities or decisions will be offered the opportunity to review and participate in the planning process.

d) Emergency Spill Response – In addition to formal notification procedures, Ecology and B. C. Environment will continue informal early notification of spills to the international portion of the Columbia River drainage.

e) Data Exchange – Upon request, all available environmental data from the international portion of the Columbia River drainage within the possession of either party to this agreement will be shared between the agencies.

f) Public Involvement – Either agency may have the lead responsibility for approving environmentally significant projects or activities that have the potential to cause cross border impacts. Upon the request of either B.C. Environment or

Ecology, the public within the geographic area of this agreement, will be given the opportunity to review and comment in writing or verbally on a proposal under consideration by the agency with jurisdiction. B. C. Environment and Ecology agree to jointly facilitate public information sharing meetings as the need arises. The location of these meetings will alternate between British Columbia and Washington State.

MEMORANDUM OF UNDERSTANDING BETWEEN THE WASHINGTON STATE DEPARTMENT OF ECOLOGY AND THE BRITISH COLUMBIA ENVIRONMENTAL ASSESSMENT OFFICE

WHEREAS

A. The Environmental Cooperation Agreement of May 7, 1992 between the Province of British Columbia and the State of Washington directed the parties to coordinated [sic] action and information sharing between the Province and the State on environmental matters of mutual concern;

B. The Memorandum of Understanding of April 1996, between the Department of Ecology (Ecology) and the British Columbia Ministry of Environment Lands and Parks (MELP) committed the Province and the State to make efforts to share information, consult with one another, and coordinate their work on environmental issues that affect resources and residents in the border region, and to include the regional office of the other jurisdiction in the distribution of environmental assessments for certain major projects;

C. The State of Washington and the Province of British Columbia recognize each other's authority and responsibilities to conduct or require, where appropriate, an environmental assessment/environmental review (EA/ER) of project proposals within their jurisdiction;

D. The State of Washington and the Province of British Columbia each have established processes for the EA/ER of certain projects within their respective jurisdictions;

E. The Province of British Columbia, as represented by the Environmental Assessment Office (EAO), and the State of Washington, as represented by Ecology, support a Memorandum of Understanding between the parties specific to inter-jurisdictional cooperation on information sharing about the practice of EA/ER in each jurisdiction, and notification and information exchange related to major project proposals in the vicinity of the other jurisdiction;

F. In the State of Washington, Ecology is a lead agency for the EA/ER of some major projects; however, EAs/ERs may be led by another state agency or a local government authority, and Ecology does not coordinate EAs/ERs led by another agency or a local government authority;

G. In the Province of British Columbia, the EAO directs the EA/ER of major projects.

THEREFORE, EAO AND ECOLOGY MUTUALLY UNDERTAKE AS FOLLOWS

IT IS THE PURPOSE OF THIS MEMORANDUM OF UNDERSTANDING (MOU) TO:

1. Facilitate information sharing and mutual understanding of the EA/ER laws, policies and processes of each jurisdiction and facilitate full knowledge of changes; and

2. Facilitate notification and information exchange regarding major project proposals that are in the vicinity of the other jurisdiction.

THIS MOU APPLIES TO THE FOLLOWING MAJOR PROJECTS THAT ARE IN THE VICINITY OF THE OTHER JURISDICTION:

1. A major project proposal in British Columbia is considered to be in the vicinity of the State of Washington if it is located 100 kilometres or less from the border between the two jurisdictions;

2. A major project proposal in the State of Washington is considered to be in the vicinity of British Columbia if it is located in any of the following counties within the State of Washington: Clallam, Jefferson, San Juan, Island, Whatcom, Skagit, Chelan, Okanogan, Ferry, Stevens and Pend Oreille.

IT IS MUTUALLY AGREED THAT:

1. Definitions

IN THIS MEMORANDUM OF UNDERSTANDING (MOU)

1.1 "major project" means, for a project located in British Columbia, a reviewable project as defined in section 1 of the British Columbia *Environmental Assessment Act* (EA Act), and for a project located in Washington State, a project subject to state jurisdiction under the *State Environmental Policy Act* (SEPA) for which a Determination of Significance has been made thereby requiring an environmental impact statement;

1.2 "parties" means the State of Washington represented by the Department of Ecology (Ecology) and the Province of British Columbia represented by the Environmental Assessment Office (EAO).

2. Mutual Understanding of the EA/ER Laws, Policies and Processes

2.1 Each party will provide the other with information on its EA/ER process for major projects

within its jurisdiction to facilitate mutual understanding of the EA/ER laws, policies and processes of each jurisdiction;

2.2 Each party will provide the other with information in a timely manner on any changes to the EA/ER laws, policies and processes of its jurisdiction that may affect the other jurisdiction.

3. Notification of Major Project Proposals and Information Exchange

3.1 Each party will provide notification to the other party of major project proposals that are in the vicinity of the other jurisdiction as follows:

(i) Ecology will provide notification about major project proposals that are in the vicinity of British Columbia by:

- on a weekly basis, forwarding to the EAO a list of all project proposals that are located in the vicinity of British Columbia for which a Determination of Significance/Scoping Notice has been issued; and
- posting information on the SEPA Register on Ecology's website in a form that is specifically sorted to identify projects that are located in the vicinity of British Columbia; and
- when Ecology is the lead agency for the proposal, providing written notice to the EAO as early as possible but no later than the time when a Determination of Significance/Scoping Notice is issued;

(ii) EAO will provide notification about major project proposals that are in the vicinity of the State of Washington by:

- providing written notice to Ecology as early as possible in the EA/ER process, but no later than seven (7) days following receipt by the EAO of copies of an accepted application for a project approval certificate, and
- ensuring information about major project proposals in the vicinity of Washington State is posted on the EAO website;

3.2 Each party will provide information on the EA/ER of a major project proposal in its jurisdiction, including information on opportunities to provide comment on the proposal, upon request from the other party;

3.3 The parties will work together to develop mechanisms for notifying and consulting with members of the public who may have an interest in a major project proposal;

4. Consideration of Comments

4.1 Each party will consider any comments received from the other jurisdiction about the potential effects of a major project proposal that is in the vicinity of the other jurisdiction prior to making any decisions regarding project approval;

4.2 For a major project proposal located in Washington State, comments will be submitted directly to the designated lead agency for the EA/ER of that proposal;

4.3 For a major project proposal located in British Columbia, comments will be submitted directly to the EAO.

5. Coordination with Other Arrangements

5.1 In implementing this MOU, existing bilateral arrangements related to joint management of the shared environment will be considered in order to support coordination and consistency with those other arrangements.

6. Dispute Resolution

6.1 In the spirit of cooperation and the efficient use of public resources, the parties will make reasonable efforts to resolve disputes arising in relation to this MOU at the lowest possible staff level through implementation planning, cooperation and consultation. Issues will be elevated to more senior management levels within each jurisdiction as needed to achieve timely resolution;

6.2 In the event of a dispute arising in relation to the technical aspects of the EA/ER of a specific major project, the parties will inform senior management levels in a timely manner and obtain direction on resolving the dispute.

7. Administration

7.1 The parties may continue existing administrative arrangements or enter into new administrative arrangements in order to implement their commitments under this MOU.

8. Term of this MOU

8.1 This MOU shall be effective when signed by both parties. It may be amended at any time by concurrence of the parties and may also be terminated by either party upon thirty (30) days written notice to the other.

Dated at Bellingham, WA
This 20 day of June, 2001

/s/ Sheila Wynn
Dr. Sheila Wynn
Deputy Minister and
Executive Director
British Columbia Environmental
Assessment Office

Dated at Bellingham, WA
This 20 day of June, 2001

/s/ Thomas Fitzsimmons
Thomas Fitzsimmons
Director
Washington State
Department of
Ecology

Province of
British Columbia

State of
Idaho

ENVIRONMENTAL COOPERATION ARRANGEMENT

Between the Province of
British Columbia and the State of Idaho

WHEREAS the Province of British Columbia and the State of Idaho are committed to ensuring citizens have a consistent and high level of environmental protection; and

WHEREAS the State of Idaho and the Province of British Columbia share extraordinary and unique regional ecosystems seamless to a physical international boundary; and

WHEREAS both governments recognize environmental concerns and impacts respect neither geographical nor political boundaries, and that there is significant benefit in cooperation and collaboration on mutual environmental interests; and

WHEREAS the Ministries of the Province and the Executive Departments of the State wish to work together to share information in regard to respective responsibilities, and may enter into specific cooperative arrangements; and

WHEREAS the increased complexity of many environmental issues, particularly inter-jurisdictional impacts, require coordinated responses from both governments;

NOW, THEREFORE, the Province of British Columbia and the State of Idaho undertake to establish the **British**

Columbia/Idaho Environmental Cooperation Initiative to identify, coordinate and promote mutual efforts to ensure the protection, conservation and enhancement of a shared environment, to the benefit of current and future generations.

ACCORDINGLY, the parties will develop an action plan within one year of signing this arrangement that will form the basis of this effort, reflecting mutual priorities. The Parties may also enter into specific arrangements necessary to effectively address shared environmental goals.

DATED

This 14 day of September, 2003

/s/ Gordon Campbell
Gordon Campbell, Premier
Province of British Columbia

/s/ Dirk Kempthorne
Dirk Kempthorne,
Governor
State of Idaho

Province of British Columbia

State of Montana

ENVIRONMENTAL COOPERATION ARRANGEMENT

Between the Province of British Columbia
and the State of Montana.

WHEREAS the Province of British Columbia and the State of Montana are committed to ensuring a consistent and high level of environmental quality for their citizens; and

WHEREAS the State of Montana and the Province of British Columbia share spectacular and priceless regional ecosystems which transcend the international boundary between them; and

WHEREAS both governments recognize that environmental concerns and impacts respect neither geographical nor political boundaries, and that there is significant benefit in cooperation and collaboration on mutual environmental interests; and

WHEREAS the Ministries of the Province and the Executive Departments of the State wish to share information and are prepared to work together with regard to their respective responsibilities, and may wish to enter into specific cooperation arrangements; and

WHEREAS the increased complexity of environmental issues, particularly their inter-jurisdictional impacts, requires coordinated responses from both governments;

NOW, THEREFORE, the Province of British Columbia and the State of Montana undertake to establish the **British Columbia/Montana Environmental Cooperation Initiative** to identify, coordinate and promote mutual efforts to ensure the protection, conservation and enhancement of our shared environment for the benefit of current and future generations.

ACCORDINGLY, the parties will develop an action plan within one year of signing this arrangement which will form part of these efforts, reflecting mutual priorities. The Parties may also enter into specific arrangements necessary to effectively address shared environmental goals.

DATED at Big Sky, Montana
This 14 day of September, 2003

/s/ Gordon Campbell
Gordon Campbell, Premier
Province of British Columbia

/s/ Judy Martz
Judy Martz, Governor
State of Montana

MEMORANDUM OF UNDERSTANDING BETWEEN THE IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY AND THE BRITISH COLUMBIA MINISTRY OF WATER, LAND AND AIR PROTECTION

I. Purpose and Scope

In September 2003, the Governor of Idaho and the Premier of British Columbia signed an Environmental Cooperation Arrangement. It commits the two jurisdictions to "identify, coordinate and promote mutual efforts to ensure the protection, conservation and enhancement of our shared environment for the benefit of current and future generations."

The Arrangement called for the development of an action plan within one year of signing and went on to authorize the state and province to "enter into specific arrangements necessary to effectively address shared environmental goals."

The Idaho Department of Environmental Quality (hereafter DEQ) and the British Columbia Ministry of Water, Land and Air Protection (hereafter the Ministry) are the agencies responsible for implementation. For the purposes of this Memorandum of Understanding (MOU), those agencies shall be deemed the Lead Agencies.

The purpose of this MOU is to set out an action plan to give effect to the Environmental Cooperation Arrangement. This MOU describes approaches to addressing transboundary environmental issues that can be used by the Lead Agencies. It is designed to be general, with the

recognition that subject-specific memoranda may be developed and added as appendices to implement this MOU if the Lead Agencies jointly agree to do so. These appendices may include other parties if the Lead Agencies determine that this will be beneficial.

II. Responsibilities

DEQ is Idaho's main environmental protection agency, with lead responsibility for air and water quality, waste management and remediation, and assistance and education to citizens and businesses on environmental issues. The Department's mission is to protect human health and preserve the quality of Idaho's air land and water for use and enjoyment today and in the future.

The Ministry is responsible for environmental protection and water, land and air quality, the stewardship of biodiversity, park and wildlife recreation management, and environmental monitoring and enforcement in British Columbia. The Ministry's vision is a clean, healthy and naturally diverse environment that enriches people's lives, now and in the future.

III. Provisions

The Ministry and DEQ wish to maximize efficiency and effectiveness, and to cooperate in a spirit of partnership. Toward this end, they agree to make every effort to share information, consult with one another, and coordinate their work on environmental issues that affect resources and residents in the border region.

The DEQ Coeur d'Alene Regional Office Administrator and the Ministry's Regional Manager Environmental Protection

in Penticton will be the designated lead liaisons for cross-border communications to serve as points of contact on issues related to the Environmental Cooperation Arrangement and implementation of this MOU;

In particular, the agencies commit to:

- establish communications among staff members working on issues with cross-border impacts to enable open sharing of information and awareness of processes for public review and comment;
- provide referrals to other agencies within the state and province when an environmental issue needing resolution does not fall within the responsibilities of the lead agency; and
- establish working relationships with regional representatives of federal agencies and Indian tribes to facilitate cooperation on appropriate issues.

In accordance with implementing appendices to be developed by the Lead Agencies, DEQ and the Ministry will:

- include the regional office of the other jurisdiction in the distribution of environmental assessments developed by DEQ or the Ministry for major projects likely to have cross-border impacts;
- develop notification procedures to identify environmental problems or sources of controversy to residents or government agencies in the border region;
- establish procedures to cooperatively respond to emergencies that could cause environmental harm or damages.

IV. Dispute Resolution

In the spirit of partnership and the efficient use of public resources, the parties agree to attempt to resolve disputes or conflicts at the lowest possible staff level. Issues will be elevated to more senior management levels within each agency as needed to achieve resolution. The mutual goal shall be to ensure the rapid resolution of disagreements before negative impacts on the environment or economy occur.

V. Terms of this Memorandum of Understanding

This agreement shall be effective when signed by both parties. It may be amended at any time by agreement between the parties and may be terminated by either party upon 30 days written notice to the other.

IN WITNESS OF THE AGREEMENT TO ADHERE TO THE TERMS OF THIS MEMORANDUM OF UNDERSTANDING, the parties have executed it by their signatures:

/s/ Steve Allred
Steve Allred
Director
Idaho Department of
Environmental Quality

/s/ Gord Macatee
Gord Macatee
Deputy Minister
Ministry of Water,
Land and Air Protection

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No. 06-1188

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

TECK COMINCO METALS, LTD.,

Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, AND STATE OF WASHINGTON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE NATIONAL MINING ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 06-1188

TECK COMINCO METALS, LTD.,

Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, AND STATE OF WASHINGTON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE NATIONAL MINING ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National Mining Association ("NMA") is a national trade association that represents all aspects of the mining industry, including producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral processing machinery and supplies; bulk transporters; mineral processors; financial and engineering

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. Consent letters from all parties have been filed with the Clerk.

firms; and other businesses related to mining. The mining industry produces vital resources needed to fuel our economy and manufacture virtually all commodities sold in domestic and foreign markets. In 2005, the U.S. mining industry produced $78.4 billion of finished mineral, metal and fuel products; these products were in turn used to create an additional $2 trillion worth of consumer and industrial goods. *See* The Economic Contributions of the Mining Industry in 2005 at 3, prepared for National Mining Association (2007).

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Its mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

Amici regularly represent their members' interests before Congress, state legislatures, and federal and state courts and have participated as *amici* in numerous cases pending before this Court, including cases involving application of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and other environmental laws. *See, e.g.*, *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, No. 02-1343, 539 U.S. 914 (2003) (NAM); *Deaton* v. *United States*, No. 03-701, 541 U.S. 972 (2004) (NMA).

Amici have a substantial interest in this case. Their members own or operate facilities located near the U.S. borders with Canada and Mexico and adjacent to cross-boundary bodies of water. The Ninth Circuit concluded that applying CERCLA to petitioner Teck Cominco Metals, Ltd. ("Teck"), a Canadian corporation, for conduct occurring solely in Canada was not an extraterritorial application of

CERCLA. The Ninth Circuit's unprecedented application of CERCLA liability—and its contorted interpretation of the presumption against extraterritorial application of U.S. laws—threatens to disrupt the cooperative diplomatic approach traditionally, and successfully, employed to address transboundary environmental issues.

Of crucial importance to *amici*, the Ninth Circuit's decision also may trigger reciprocal actions by foreign nations and their citizens against United States companies—including *amici*'s members—for conduct within the United States alleged to harm foreign natural resources. Such actions could adversely impact *amici*'s members and other United States companies and generate conflict and confusion over which laws govern their activities within the United States. *Amici*'s members favor an interpretation of CERCLA that establishes a clear and predictable scope for liability under the statute—and avoids the business uncertainty that would result if conduct in the United States in full compliance with federal and state environmental laws could nonetheless lead to liability imposed in foreign courts based on foreign laws.

SUMMARY OF ARGUMENT

This CERCLA case arises because of activities allegedly undertaken by Teck, a Canadian corporation, at a smelter located in Canada. Respondents allege that hazardous substances from that smelter have migrated along the Columbia River from Canada into the State of Washington. The District Court acknowledged that imposing liability on Teck "involves an extraterritorial application of CERCLA to conduct occurring outside U.S. borders," because the alleged contamination "in the United States would not exist without the activity at the smelter located in British Columbia." Pet. App. 37a, 38a. But it nonetheless held that applying CERCLA to Teck was appropriate. The Ninth Circuit affirmed on the wholly different ground that imposing liability on Teck was merely a "domestic" application of

CERCLA—even though Teck is indisputably a foreign corporation and is not alleged to have engaged in any conduct inside the United States. Pet. App. 14a.

The Ninth Circuit's decision extends "domestic" applications of CERCLA liability to cover any actions by any entity around the globe that allegedly result in hazardous substances reaching U.S. shores. Such a reading of the presumption against extraterritoriality seriously undermines, to the point of gutting, the "long-standing principle of American law 'that legislation of Congress, unless a contrary intention appears, is meant to apply only within the territorial jurisdiction of the United States.' " *E.E.O.C.* v. *Arabian American Oil Co.* ("*Aramco*") 499 U.S. 244, 248 (1991) (citation omitted). This principle protects "against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* And adhering to the presumption against extraterritoriality is particularly appropriate in this context, because transboundary pollution is a matter of quintessential international concern—and has consistently been recognized as such.

Transboundary pollution issues have traditionally been addressed through diplomatic discourse and bilateral agreements. The Ninth Circuit's holding sets two countries—and businesses on both sides of the U.S.-Canada border—on a path away from cooperative diplomacy in the resolution of cross-border environmental issues and toward piecemeal litigation by private parties under CERCLA that will (indeed, already has) upset diplomatic relations between the United States and Canada. And the import of the Ninth Circuit's decision is by no means limited to foreign conduct in Canada. The court's rationale applies to conduct occurring across the border with Mexico, or for that matter in any foreign country, that allegedly causes adverse effects in the United States. Air and water migrate without regard to international boundaries, and science is increasingly capable of tracking the flow of environmental contaminants. The

Ninth Circuit's decision effectively opens United States courts to claims under CERCLA with respect to conduct the world over, potentially inviting unintended clashes with the interests of numerous sovereigns and the businesses operating within their boundaries.

American businesses will suffer the consequences of the international discord generated by the decision below. Applying CERCLA to foreign companies operating on foreign soil will inevitably encourage retaliatory actions by foreign countries and foreign citizens against U.S. businesses. And the prospect that the environmental laws of foreign countries may govern the activities of a company's domestic operations will add to the complex regulatory requirements that U.S. businesses already must navigate under United States law. American businesses should not be subjected to those added burdens unless they are expressly contemplated by Congress—and CERCLA evidences no such express directive. This Court should grant the petition for a writ of certiorari to examine—and reverse—the Ninth Circuit's unprecedented and far-reaching ruling.

There is an additional reason to grant certiorari. The Ninth Circuit split with the First Circuit over the contours of the "arranger" liability provision of CERCLA. This split means that the category of parties potentially subject to arranger liability is now defined differently—even for the same company—depending where in the country a company is operating. Given the stringent liability standard codified in CERCLA, it is particularly important that the requirements for arranger liability be clear, predictable, and consistent across the Nation.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION INVITES RETALIATION AGAINST AMERICAN BUSINESSES AND FOSTERS UNCERTAINTY AND DISCORD FOR NUMEROUS AMERICAN INDUSTRIES.

A. The Ninth Circuit's Decision Distorts The Meaning Of The Presumption Against Extraterritorial Application Of U.S. Law.

There is a strict presumption against extraterritorial application of U.S. law. It can only be overcome by a "clear statement" of Congressional intent to do so. *Aramco*, 499 U.S. at 259. The Ninth Circuit circumvented that strict presumption by finding that application of CERCLA liability to Teck—a Canadian company whose conduct occurred solely in Canadian territory—was a domestic application of U.S. law. This holding departs wildly from this Court's precedents. It also undercuts the fundamental principles on which those precedents are based, and it denigrates the bilateralism that has traditionally characterized the U.S.-Canadian approach to resolving transboundary pollution issues. A grant of certiorari is warranted.

The presumption that a domestic statute applies only domestically protects against "international discord" by preventing clashes of United States and foreign law. *Aramco*, 499 U.S. at 248. As Justice Holmes explained, an act's lawfulness "must be determined wholly by the law of the country where the act is done." *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909). Anything else is "unjust" and "an interference with the authority of another sovereign." *Id.* [2]

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[2] A related canon of construction is also relevant here. "[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v.

A party arguing in favor of the extraterritorial application of a law has the burden to show that Congress intended that expansive reach. *Aramco*, 499 U.S. at 250. This is a significant burden indeed; for there must be "affirmative evidence" that Congress "clearly expressed" its intent that the statute at issue apply abroad. *Id.* at 258; *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). It is well-established that "Congress ordinarily intends its statutes to have domestic, not extraterritorial, application." *Small* v. *United States*, 544 U.S. 385, 388 (2005); *see also id.* at 400 (Thomas, J., dissenting) ("extraterritoriality canon" restricts "federal statutes from reaching conduct *beyond U.S. borders*") (emphasis in original). When Congress intends to depart from ordinary domestic application, it has explicitly done so. *Aramco*, 499 U.S. at 258 (citing examples).

The District Court concluded that there was "no direct evidence that Congress intended extraterritorial application of CERCLA to conduct occurring outside the United States." Pet. App. 57a. That is, of course, correct; and no court has concluded otherwise. But undeterred by this clear lack of affirmative Congressional intent to impose CERCLA liability for conduct occurring abroad, the Ninth Circuit found another way around the presumption. It concluded that the presumption did not come into play because CERCLA was actually being applied "domestic[ally]" to Teck—a Canadian company operating in Canada. Pet. App. 14a.

In reaching this curious conclusion, the Ninth Circuit focused exclusively on whether a "release" occurred in the

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Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). Under this canon of "prescriptive comity," *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 165 (2004), "statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 815 (1993). It is an established principle of international law that nations not intrude on each other's sovereign interests.

United States. *Id.* at 19a, 20a. It neglected the other text in CERCLA's liability provision. CERCLA liability is premised on finding that a person within one of four delineated categories of liable parties had the required nexus to a vessel or facility from which there is a release. For the third category of liable parties—"arrangers"—liability is imposed where: (1) the person arranged (by contract, agreement, or otherwise) for disposal or treatment at a facility; *and* (2) there was a release or threatened release of a hazardous substance from that facility. 42 U.S.C. § 9607(a).[3]

Thus, a "domestic" application of arranger liability requires both that there be a release from a domestic facility—which the Ninth Circuit found had occurred—*and* that the party by contract, agreement, or otherwise arranged for disposal *at that domestic facility*.[4] The Ninth Circuit never addressed this point, even though no one—not the EPA, the District Court, or the Ninth Circuit—has ever disputed that whatever "arranging" is allegedly attributable to Teck did not occur in the United States. Holding Teck liable under U.S. law for conduct it performed solely within

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[3] The arranger-liability provision states in relevant part: "*any person who by contract, agreement, or otherwise arranged for disposal or treatment* * * * of hazardous substances * * * *at any facility* * * * *from which there is a release* * * * of a hazardous substance, shall be liable" for certain costs. *Id.* § 9607(a)(3), (4) (emphases added). The phrase beginning "from which there is a release" modifies subparagraphs 1-4, even though it follows subparagraph 4. *See, e.g., United States* v. *Township of Brighton*, 153 F.3d 307, 328 n.8 (6th Cir. 1998).

[4] Courts have repeatedly held that the term "disposal" does not include the passive migration of materials; it requires "active human conduct." *United States* v. *150 Acres of Land*, 204 F.3d 698, 705-706 (6th Cir. 2000) (noting CERCLA's distinction between the definitions of "disposal" and "release"); *accord ABB Indus. Sys., Inc.* v. *Prime Tech., Inc.*, 120 F.3d 351, 358 (2d Cir. 1997); *United States* v. *CDMG Realty Co.*, 96 F.3d 706, 714 (3rd Cir. 1996).

Canada—and that was authorized by Canadian law—plainly implicates the presumption against extraterritoriality.

B. The Ninth Circuit's Decision Flouts The International Mechanisms Long Deemed Appropriate For Resolving Transboundary Pollution Issues.

The Ninth Circuit decision does a grave disservice to the United States' history of addressing transboundary pollution through diplomatic channels and international agreements. Congress enacted CERCLA in 1980 against the backdrop of a settled international framework for addressing transboundary pollution issues—including issues relating to the very smelter at issue in this case. There is no indication whatsoever that Congress sought to meddle with that established framework when it enacted CERCLA.[5]

For nearly a century, the United States and Canada have looked to bilateral, diplomatic resolutions of transboundary pollution issues. *See generally* United States Department of State, Background Note: Canada (Mar. 2007) ("The U.S. and Canada also work closely to resolve transboundary environmental issues, an area of increasing importance in the bilateral relationship."). In the Boundary Waters Treaty of 1909, the two nations created the International Joint Commission ("IJC") to resolve disputes over boundary waters. The IJC has since played a crucial role in resolving transboundary pollution issues. *See, e.g.*, IJC, "Transboundary Impacts of the Missisquoi Bay Causeway and the Missisquoi Bay Bridge Project" (2005); IJC, "Transboundary Air Pollution, Detroit and St. Clair River Areas" (1972).

In 1939, when emissions from the Canadian smelter involved in this case were alleged to be damaging property in the United States, the two nations agreed to an arbitration

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[5] Congress is presumed to know the state of existing law when it legislates. *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988).

procedure that gave rise to one of the seminal decisions on international pollution—the "Trail Smelter Arbitration." Trail Smelter Arbitral Tribunal (U.S. v. Can.) (Apr. 16, 1938), 33 Am. J. Int'l L. 182 (1939); Trail Smelter Arbitral Tribunal (U.S. v. Can.) (Mar. 11, 1941), 35 Am. J. Int'l L. 684 (1941). The United States did not unilaterally assess liability for acts within the sovereign nation of Canada. It employed the traditional method of resolving sensitive questions of transboundary environmental harm through international channels, not private litigation.

The list goes on; this Nation's history is replete with other examples of the United States' bilateral approach to transboundary harms. The United States and Canada used international arbitration to resolve harms to U.S. citizens caused by flooding and erosion from a Canadian dam. *See* Gut Dam Arbitration/Settlement (U.S. v. Can.), *reprinted in* 8 I.L.M. 118 (1969). A few years later, the United States and Mexico negotiated resolution of a longstanding controversy over the increased salinity of water reaching Mexico via the Colorado River. *See* S. Rep. No. 93-906 (1974). The United States and Canada signed an agreement twenty years ago to resolve issues of moving hazardous waste across their shared border. Agreement Concerning the Transboundary Movement of Hazardous Waste, Oct. 28, 1986, TIAS No. 11099, Art. 7. And, just last month, the United States and Canada announced they were negotiating an annex to the 1991 U.S.-Canada Air Quality Agreement (Pet. 11) to "reduce[e] the cross-border flow of air pollution and its impact on the health and ecosystems of Canadians and Americans." *See* EPA Press Release, "Canada and U.S. Move Forward to Reduce Air Pollutants" (Apr. 13, 2007).[6]

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[6] Beyond this Nation's own history of bilateralism, international compacts confirm that an active international framework for addressing transboundary pollution exists. *See, e.g.*, Decl. of the United Nations Conf. on the Human Env't, Principle 22 (June 16, 1972); Rio Decl. on Env't and Dev., Principle 13 (June 14, 1992).

Local governments likewise have treated transboundary pollution as an international diplomatic issue. In 1982, for example, the National Conference of Commissioners on Uniform State Laws and the Uniform Law Conference of Canada proposed a Uniform Transboundary Pollution Reciprocal Access Act, 9C U.L.A. 387, 388 (2001). This Act allows a citizen who is injured by pollution emanating from another state to sue in the source state's courts as though he lived in the source state. *Id.* at 394. The plaintiff has the same rights as anyone else in the source jurisdiction. *Id.* at 394-395. The Act has been adopted by several U.S. states and Canadian provinces. *See, e.g.*, Colo. Rev. St. §§ 13-1.5-101 *et seq.*; Mich. Laws Ann. §§ 324.1801 *et seq.*; Or. Rev. Stat. §§ 468.078 *et seq.*; Manitoba Transboundary Pollution Reciprocal Access Act, C.C.S.M., 1985, c. T145; Prince Edward Island Transboundary Pollution (Reciprocal Access) Act, R.S.P.E.I., 1988, c. T-5.[7] And its position—that the source jurisdiction's laws govern—was also adopted by the United Nations. *See* United Nations, Int'l Law Comm'n, Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, 56th Session, Principles 4, 6 (A/CN.4/L.662) (July 2004).[8]

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[7] Although neither the State of Washington nor the Province of British Columbia has adopted the Uniform Act, these two entities created the Environmental Cooperation Council ("ECC") in 1992 to deal with transborder environmental issues. The ECC acts as a "significant catalyst to cooperative environmental management" between British Columbia and Washington, and has a Task Force dedicated to air and water quality issues in the Columbia River Basin. *See* ECC, "The Role of ECC," *available at* http://www.env.gov.bc.ca/spd/ecc/role.html.

[8] In other words, even if this transboundary pollution issue were to be resolved under the domestic law of one of the two sovereigns involved in the dispute, the relevant domestic law that should apply is *Canadian law*—not CERCLA.

This long history reinforces the conclusion that countries can best address and resolve sensitive transboundary pollution problems through diplomatic channels or traditional international law mechanisms, such as arbitration tribunals, that can balance complex diplomatic issues alongside environmental and private interests. Permitting private plaintiffs to bring actions challenging foreign conduct would disrupt the international framework that has long been successfully employed to resolve transboundary environmental disputes.

C. The Ninth Circuit's Decision Will Precipitate Retaliation, Uncertainty, And Discord Throughout American Industries.

Applying CERCLA to foreign companies acting wholly in a foreign country will not only disrupt the settled international framework for resolving transboundary pollution disputes; it also is likely to trigger backlash and retaliation against American companies.

1. Canada reacted to the EPA's Order in this case by pointing to the serious international ramifications of extending CERCLA beyond U.S. borders. The Canadian Government issued a formal Diplomatic Note expressing "concern[]" that the United States would attempt to enforce CERCLA against a Canadian company operating in Canadian territory under Canadian law. 9th Cir. ER 72. The Diplomatic Note emphasized that "issuance of the Unilateral Administrative Order may set an unfortunate precedent, by causing transboundary environmental liability cases to be initiated in both Canada and the United States." *Id.* And it requested that the United States rescind the UAO in favor of "develop[ing] a mutually acceptable and enforceable agreement, in the spirit of the long history of joint Canada-U.S. stewardship of our shared environment." *Id.*

The diplomatic arm of the Executive Branch—in a break from EPA—separately voiced its own concerns over the unilateral extraterritorial enforcement of CERCLA. The

United States Ambassador to Canada asked the EPA to withdraw the UAO. Letter from Paul Cellucci, Ambassador of the United States of America to Canada to Michael O. Leavitt, Administrator, U.S. Environmental Protection Agency (June 15, 2004). His letter explained that "pursuing a clean-up program through legal action under [CERCLA] has the potential, because of its unilateral nature, to cause significant harm to our otherwise productive and cooperative bilateral environmental relationship." *Id.* He echoed the same concern voiced by the Canadian Government: "The Government of Canada could use this precedent to justify its own unilateral decisions regarding U.S. companies whose actions inside the U.S. impact on Canadian watersheds." *Id.*

The EPA eventually responded to the concerns raised by Canada and the Executive Branch and rescinded the UAO. Pet. App. 9a n.10. The rescission of the UAO demonstrates the importance and efficacy of fostering bilateral resolutions of transboundary pollution issues—but it did not resolve this case. For even if EPA rescinds a UAO, it is in no position to extinguish the process to which private parties such as respondents here have access under CERCLA. *See id.*

2. If the Ninth Circuit's decision remains in place, American businesses will face uncertainty and potential retaliation not only from Canada, but from other countries around the globe. "The specter of reciprocity is a very real concern because transboundary pollution flows both ways." Austen L. Parrish, *Trail Smelter Deja Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. Rev. 363, 410-411 (2005). Applying CERCLA to a Canadian company for conduct in Canada invites the government and citizens of Canada to turn the tables and do the same, with United States businesses as the defendants. *See* Shi-Ling Hsu & Austen L. Parrish, "Litigating Canada–U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial

Reciprocity," 48 Va. J. of Int'l L. 1 (publication forthcoming Oct. 2007), *available at* http://ssrn.com/abstract=967519 (arguing that Canada is likely to turn to extraterritorial application of its environmental statutes to address U.S. pollution causing cross-border harm).

Canada has reacted strongly in the past when it has perceived the United States to be encroaching on its sovereign affairs—and the decision below encourages it to do so again.[9] This concern is not hypothetical. About forty-five percent of rivers on the U.S.-Canadian border, for example, flow from the United States into Canada. Parrish, *supra*, at 410. Industrial emissions from the United States are allegedly causing environmental harm to Canadian Inuit and Arctic wildlife. *Id.* And the Province of Ontario recently argued to the Seventh Circuit that its air quality is compromised by U.S. pollution, pointing out that "[m]ore than 50% of the air pollution in Ontario is generated by U.S. sources." Province of Ontario Amicus Br. 18, *United States* v. *Cinergy Corp.*, Case No. 06-1224 (7th Cir.) (filed May 9, 2006). The Province argued that the "cost of transboundary air pollution in Ontario in human, environmental and economic terms is considerable," including more than $3.7 billion (CDN) in human costs and more than $1 billion in environmental costs. *Id.* at 19.

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[9] In 1985, for example, reacting to the United States' extraterritorial enforcement of its antitrust laws, Canada enacted blocking legislation (titled the Foreign Extraterritorial Measures Act, or FEMA). *See* R.S.C., ch. F-29 (1985) (Can.). FEMA grants Canada's Attorney General broad authority to prevent extraterritorial encroachments on Canadian sovereignty with respect to antitrust proceedings. Throughout the 1990s, the Canadian Attorney General issued orders under FEMA prohibiting Canadian compliance with the United States' extraterritorial efforts to block trade with Cuba. *See* John W. Boscariol, *An Anatomy of A Cuban Pyjama Crisis: Reconsidering Blocking Legislation in Response to Extraterritorial Trade Measures of the United States*, 30 Law & Pol'l Int'l Bus. 439, 452-454 (1999).

Numerous other nations similarly have contended that U.S. industrial practices have caused environmental contamination; indeed, many sources suggest that the United States is the world's largest polluter. *See, e.g.*, Nancy Kubasek & Jay Threet, *Cooper Industries, Inc.* v. *Aviall Services, Inc.: Time for a Legislative Response to Restore Voluntary Remediation*, 51 St. Louis U. L.J. 165, 181 (2006) (stating that the United States Department of Defense "is the world's largest polluter, producing more hazardous waste per year than the five largest United States chemical companies combined"); Michael Ilg, *Environmental Harm and Dilemmas of Self-Interest: Does International Law Exhibit Collective Learning?*, 18 Tul. Envtl. L.J. 59, 68 (2004). Even Congress has acknowledged that the United States is a net exporter of certain types of transboundary pollutants. *See, e.g.*, Sen. Bill No. 906 (110th Cong.) (introduced Mar. 15, 2007) (proposing mercury regulation based on findings that mercury is a transboundary pollutant and the United States is a net exporter of mercury worldwide).

United States industry—including members of *amici*—will, of course, bear the brunt of private enforcement actions brought by citizens of a foreign nation against companies operating in the United States for perceived violations of foreign environmental laws. The potential for U.S. businesses to face private environmental enforcement efforts will extend far beyond Canada, because science is increasingly capable of documenting the long-range transport of pollutants.[10] The Ninth Circuit's decision permits the

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[10] *See, e.g.*, Rokjin J. Park, *et al.*, "Natural and Transboundary Pollution Influences on Sulfate-Nitrate-Ammonium Aerosols in the United States," 109 Journal of Geophysical Research D15204 (2004) (tracking transboundary pollutants from Canada, Mexico, and Asia to the United States and contribution of transboundary pollutants from United States to Europe and North Africa); Leta Hong Fincher, Voice of America News: Worldwatch Institute—16 of the World's Most-Polluted Cities in China (June 28, 2006)

source of pollution to be held liable wherever it ultimately lands, so long as science can document the long-range transport of the pollution.

And this is so even if the company's conduct was fully in accord with the governing law of the sovereign nation in which it operates. *Amici*'s members regularly operate under permits from the EPA. At present, they can be confident that if their operations conform to their government-approved permits, they will not be violating federal environmental laws. *See, e.g.*, 33 U.S.C. § 1342(k) (compliance with a permit issued under the Clean Water Act is deemed compliance with that Act); 42 U.S.C. § 7661c(f) (compliance with a permit issued under the Clean Air Act is deemed compliance with that Act); *see also, e.g.*, 30 C.F.R. § 780.15 (outlining air pollution control plan required to obtain surface mining permit); 30 C.F.R. § 780.18 (outlining reclamation plan required for surface mining permit, including steps to be taken to comply with the Clean Air Act, Clean Water Act, and other environmental laws and regulations).

The Ninth Circuit's ruling, if it stands, will embolden foreign plaintiffs to sue U.S. businesses for purported environmental wrongs—as dictated by the standards of their own environmental law regimes, not United States law. As a result, companies in the United States, which currently expend vast resources ensuring that their businesses operate in accordance with our Nation's law, would have to devote even more substantial efforts, money, and personnel to examining environmental law around the world, and to attempting to protect or insure against potential liability under all of those laws as well. And the price of noncompliance with one or more foreign sovereign's laws

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(discussing atmospheric transport of pollution to the United States from China); Clean Air Report, *Industry Calls for Relaxed Haze Rule Following New Emissions Study* (Mar. 9, 2006) (discussing study finding transboundary pollution from Canada, Mexico, and Asia makes "large contributions" to haze in the United States).

could be steep indeed: the same discharge or emission could result in exponential liability in numerous countries, depending on how far science is able to follow the trail around the globe. This in turn will introduce grave unpredictability about potential environmental liability from foreign environmental laws. And that instability in turn will necessarily hamper trade and economic growth. *See, e.g.*, Christopher L. Ingrim, *Choice-of-Law Clauses: Their Effect on Extraterritorial Analysis—A Scholar's Dream, A Practitioner's Nightmare*, 28 Creighton L. Rev. 663, 664 (1995) (legal uncertainty is "inherently disturbing to the international business community which requires a reasonable amount of certainty and predictability in order to trade freely and efficiently in today's global economy").

To say the least, this is not a happy prospect for United States industry. The Ninth Circuit's ruling is not just an ill-considered and indefensible textual interpretation of CERCLA. It was issued without regard to the diplomatic sensitivities that must inform the menu of available remedies in any instance of transboundary pollution, and without regard to the prospect that many stalwart American industries may now be subjected to exponential foreign liability for their daily domestic operations—all depending on which way the wind blows or the water flows. Certiorari should be granted to address and resolve this issue.

II. THIS COURT'S REVIEW IS NEEDED TO ESTABLISH NATIONAL UNIFORMITY ON THE QUESTION OF ARRANGER LIABILITY.

The circuit split on the scope of arranger liability under § 107(a)(3) is ripe and merits review. *See* S. Ct. Rule. 10(a); *see also South Florida Water Mgmt. Dist.* v. *Montalvo*, 84 F.3d 402, 406 (11th Cir. 1996) (noting that courts have "struggled with the contours of 'arranger' liability under § 107(a)(3)"). The First and Ninth Circuits have taken diametrically opposed positions on what the term "by any other party or entity" modifies—which in turn determines

who is within the third category of "covered persons" under CERCLA's liability provision.[11]

When presented with the question who is included in the scope of arranger liability, the First Circuit turned to the "sentence structure" of § 107(a)(3)—which it found "makes it clear" that the provision attaches when the party who owns or possesses the hazardous material arranges *with another party* for disposal or treatment of that material. *American Cyanamid Co.* v. *Capuano*, 381 F.3d 6, 24 (1st Cir. 2004). In reaching its conclusion, the First Circuit expressly rejected an interpretation of the statute that would have required editing the operative provision of the statute to add a new word—"or"—not in the text. The First Circuit thus declined to read CERCLA so as to "make liable any person who arranged for the disposal of a hazardous substance 'owned or possessed by such person [*or*] by any other party or entity.' " *Id.* at 23-24 (emphasis added).

The Ninth Circuit had no such compunction about retrofitting the statute to suit its preferred interpretation. Within the Ninth Circuit, arranger liability extends to "any person who * * * arranged for disposal or treatment * * * of hazardous substances owned or possessed by such person [*or*] by any other party or entity." Pet. App. 24a (emphasis added). The Ninth Circuit thus has eliminated any requirement that a party "arrange" with a third party for disposal before arranger liability attaches, while the First Circuit has upheld the requirement of third-party

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[11] The arranger liability provision states in relevant part that: "any person who by contract, agreement, or otherwise arranged for disposal or treatment * * * of hazardous substances owned or possessed by such person, *by any other party or entity*, at any facility * * * from which there is a release * * * of a hazardous substance, shall be liable" for certain costs. 42 U.S.C. § 9607(a)(3), (4) (emphasis added to disputed clause).

participation.[12] *Amici*'s members, who have operations in both the First and Ninth Circuits, now face national business uncertainty about the scope of arranger liability.

The starting point for interpreting a statute is always the plain and unambiguous meaning of the statute. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997). That a statute "is awkward, and even ungrammatical" does not mean it is ambiguous on the point at issue. *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004). The Ninth Circuit, in the guise of employing a "liberal judicial interpretation" of CERCLA (Pet. App. 26a), added the word "or" to the liability provision. Its stated reason: adhering to the plain language of the statute would create a gap in the liability regime. *Id.* Perhaps, or perhaps not. But it is not the province of a Ninth Circuit panel to remedy a perceived legislative oversight.

The Ninth Circuit's reading "is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *Iselin* v. *United States*, 270 U.S. 245, 251 (1926). But as this Court made clear long ago, "[t]o supply omissions transcends the judicial function." *Id.* Courts may not "read an absent word into the statute" when

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[12] Further support for the First Circuit's holding—and further confirmation that the Ninth Circuit erred—can be found in the established interpretive cannons of *noscitur a sociis* and *ejusdem generis*. Under these canons, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dep't of Social & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (quotation omitted). Applied here, the term "otherwise arranged"—as the last item in the sequence "by contract, agreement or otherwise arranged"—should have the same requirement of two-party conduct shared by the preceding terms, "contract" and "agreement." That is the First Circuit's interpretation, and it is the far better reasoned one.

there is a "plain, nonabsurd meaning in view." *Lamie*, 540 U.S. at 538; *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978) (courts "have no authority to substitute [their] views for those expressed by Congress in a duly enacted statute"). By adding the word "or" the Ninth Circuit radically expanded the scope of arranger liability. Its decision merits review. The arranger-liability requirements should be the same in all federal courts and should be based on clear, predictable rules. The conflict created by the decision below will directly affect companies and industries that operate in multiple states, including *amici*'s members who now face varying rules and potentially different outcomes with respect to a crucial liability determination. The Court should grant certiorari and establish national uniformity on this important question presented.

CONCLUSION

For the foregoing reasons, as well as those presented in the petition, the petition should be granted.

Respectfully submitted,

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